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THE
ONTARIO LAW REPORTS

CASES DETERMINED IN THE COURT OF APPEAL
AND IN THE HIGH COURT OF JUSTICE
FOR ONTARIO.

1905.

REPORTED UNDER THE AUTHORITY OF THE
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OF THE
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DURING THE PERIOD OF THESE REPORTS.

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MEMORANDUM.

On the 10th of February, A.D. 1905, ROGER CONGER CLUTE, one of His Majesty's Counsel, was appointed a Justice of the Exchequer Division in the place of the Honourable JOHN IDINGTON, appointed a Judge of the Supreme Court of Canada.

ERRATA.

- Page 26, line 12 from end—For “478” read “178.”
Page 34, line 10—For “786” read “780.”
Page 40, line 2 from end—For “126-7” read “125-6.”
Page 153, line 9 from end—For “*infunt*” read “*insunt*.”
Page 164, line 20—For “572” read “566.”
Page 167, last line—For “1 Ch. D.” read “10 Ch. D.”
Page 277, line 9 from end—For “58” read “158.”
Page 282, line 6 from end—For “521” read “511.”
Page 287, 14th line—For “Queen” read “Quinn.”
Page 380, 4th line of headnote—Insert “466” after “2 O.W.R.”
Page 395, 4th line from top—Before “De G. M. & G.” insert “5.”
Page 415, line 5 from end—Reference should be to “5 Ch. D. . . .”
Page 463, last line of headnote—For “38” read “58.”
Page 493, 2nd line of headnote—For “defendants” read “plaintiffs.”
Page 569, last line of 2nd paragraph of headnote—After “set” insert
“out.”
Page 589, 2nd line from bottom—For “Q.B.” insert “Q.B.D.”
Page 622, 16th line from bottom—For “365” insert “265.”

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REPORTS OF CASES

DETERMINED IN THE

COURT OF APPEAL

AND IN THE

HIGH COURT OF JUSTICE FOR ONTARIO.

[IN CHAMBERS.]

RE BRAIN, BRAIN V. BRAIN.

1904

Oct. 26.

Will—Brewery Business—No Express Authority to Carry On—Authority to do so Refused.

Where under a will no express power has been given to carry on the deceased's business an order will not be made authorizing the carrying on of the same by the personal representatives. Discretionary power was, however, given in this case, that of a brewery business, either to sell the chattel property and lease the brewery, or to sell the business as a going concern with a lease of the premises until the date fixed for distribution, with an agreement for sale if deemed advisable, subject to the approval of the beneficiaries, on an infant beneficiary attaining her majority.

THIS was a motion by the executors under the last will and testament of Edwin Brain, deceased, under Rule 938, for the construction of the will and for directions for the carrying on of the business of the deceased, a brewery business, or for an order for the sale of the estate, or such part thereof as might be deemed expedient, and in particular for the sale of the brewery business, or for an order for the winding up of the business, and for the sale of the remainder of the estate, and, if necessary, for an order for the administration of the real and personal estate.

The testator by his will, after directing the payment of his just debts and testamentary expenses, gave and bequeathed to his wife, Mary Elizabeth Brain, the use and possession of all his real and personal estate during the period of her natural life, or the length of time she remained his widow, for the

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benefit of herself and family; and after the decease of his wife (or, in the event of her marrying again, after her second marriage) he authorized and directed his executors to divide his property equally between his children when the younger attained the age of twenty-one years; and he appointed his wife and brothers his executrix and executors.

On October 14th, 1904, the motion was heard before ANGLIN, J., in Chambers.

B. F. Justin, for the plaintiffs, the executors.

W. S. Morphy, for the defendant, J. C. F. Brain.

F. W. Harcourt, for the infant.

October 26. ANGLIN, J.:—In the absence of any provision authorizing the carrying on of the testator's business by his personal representatives no order can be made sanctioning that course. The will confers no power of sale on the executors and executrix. Under these circumstances they may take whichever one of two courses they deem more advantageous for the estate. They may sell the chattels and lease the brewery premises until the period fixed for division of the estate; or they may sell the business—chattels and good-will—as a going concern, giving to the purchaser a lease of the premises until the period of division fixed by the will, with an agreement for sale, if deemed advisable, subject to the approval of the beneficiaries when the present infant attains her majority. For this latter purpose the executrix and executors may carry on the business, but only for such time as may be necessary and proper to effect a reasonably advantageous sale. Having regard to the nature of the business itself the sale should be made at the earliest date conveniently possible.

Costs to all parties out of estate.

G. F. H.

[OSLER, J.A.]

IN RE PANTON AND THE CRAMP STEEL COMPANY,
LIMITED, ET AL.

1904

July 23.

Company—Transfer of Shares—Right to Have same Recorded—Resolution Closing Books—Invalidity of—Mandamus.

A transferee of fully paid up shares in a company incorporated under the Ontario Companies Act, R.S.O. 1897, ch. 191, is entitled, on the presentation to the company of a transfer of shares, to have same recorded in the books of the company, the directors, in the absence of a by-law under sub-sec. 47 (a) regulating the transfer, having no discretion in the matter.

Where therefore, under a resolution of the directors, there being no by-law for the purpose, the books were closed for a brief period for the alleged purpose of avoiding confusion or inconvenience in ascertaining the shareholders entitled to vote at the annual meeting, and during such period the company refused to record a transfer of shares, a mandamus was granted compelling such transfer to be recorded.

THIS was a motion by a transferee of four shares of the common stock in the Cramp Steel Company, Limited, incorporated under the Ontario Companies Act, R.S.O. 1897, ch. 191, for an order requiring the Steel Company, by the National Trust Company, their agents, or otherwise, to record a transfer thereof to the said transferee.

Angus Smith, who was the owner of four shares of the common stock of the Cramp Steel Company, standing in his name, on the 19th day of July, 1904, by a proper transfer of the said stock transferred the same to the applicant. His solicitor thereupon attended the office of the National Trust Company, who were the agents of the Steel Company, and who had charge of the books, and presented to the secretary the scrip and transfer of the stock, and asked to have such transfer registered on the company's books, which the secretary promised to do; but subsequently, on the same day, he wrote to the solicitor stating that the National Trust Company merely acted as agents for the Steel Company, and he had notified the company of the request so made, and had received instructions from the board of directors that a resolution had been passed by the directors under which the transfer books of the company had been closed until the 30th of July, and that no transfer could be made until after that date, and the Trust Company therefore

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could not register the transfer. The solicitor on receipt of this letter attended at the office of the Trust Company and personally demanded such registration, which however was refused. He then wrote both to the Cramp Steel Company and to the National Trust Company formally demanding the registration of the transfer, pointing out that no by-law had been passed on the subject and asking to be furnished with a copy of the said resolution. These demands not having been complied with this motion was then made.

The 30th July was the date of the annual meeting, the alleged object being to avoid inconvenience or confusion in ascertaining the shareholders entitled to vote at such meeting.

The motion was heard before OSLER, J.A., sitting for ANGLIN, J., in the Weekly Court on July 22nd, 1904.

Frank Arnoldi, K.C., for the motion.

W.H. Blake, K.C., for the National Trust Company, contra.
No one appeared for the Cramp Steel Company, Limited.

July 23. OSLER, J.A.:—I think this motion must be granted. The transfer of the stock of the applicant is in order, and would have been recorded by the secretary of the Trust Company but for the instructions they received from the Steel Company on the 21st of July not to do so until the 30th of July, or until after that date. These instructions, and the resolutions of the directors on which they were based, were evidently given and passed under an entire misapprehension of the Steel Company's legal right. The transfer being in order and the stock paid in full, the directors in the absence of a by-law under sub-sec. 47 (a) regulating the transfer had no discretion to exercise in the matter or option but to comply with the demands of the transferee to record it. It may be convenient that for a brief period before the annual or a special meeting of the shareholders transfers should not be recorded, so as to avoid confusion, or rather perhaps, some inconvenience in ascertaining who are shareholders entitled to be present or represented at the meeting, but the power to impose this restriction on sellers and purchasers of shares has not, that I can see, in the absence of a by-law been conferred upon the directors, nor do I find any authority, nor have counsel been able to refer me to any, which

might indicate that, in the absence of statutory authority, the company have any discretion in this respect. The only hesitation I have felt about making the order arose from the resolution of the 20th of July; but inasmuch as the Trust Company are still the general agents of the Steel Company for the purpose of recording transfers, under the terms of a somewhat formal and elaborate agreement, and the only reason assigned for the passing of the resolution, resting as I have said, on misapprehension of the legal rights of the Steel Company, I am of the opinion that the reservation mentioned in the agreement must be read as limited to instructions and reservations which they can legally impose, or in respect of rights which they could themselves exercise in reference to a transfer as that in question.

The Steel Company must pay the cost of the applicant and of their agents, the National Trust Company.

G. F. H.

Osler, J.A.

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IN RE

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[BOYD, C.]

Nov. 28.

HIXON V. REAVELEY.

Waste — Repairs — Selling Timber — Law of England — Application thereof to Ontario.

Where a building needed repair and the timber on the place was unsuitable, and the tenant for life proposed to sell sufficient timber off the place to pay for the kind of timber required, and for that purpose only :—
Held, that this would not be waste, if the timber was cut with due regard to the situation of the bush and the cleared land, and no unreasonable amount was taken off to recoup the cost of the timber used in the repairs.
 All the niceties of the ancient learning as to waste are not to be transferred without discrimination to such a country as this Province.

THIS was an action brought for an injunction and damages for waste under the circumstances stated in the judgment, and was tried before BOYD, C., at Welland, on November, 22nd, 1904.

L. C. Raymond, for the plaintiff, referred to *Re J. T. Smith's Trusts* (1883), 19 C.L.J. 232; *Wilson v. Graham* (1887), 13 O.R. 661; *Saunders v. Breakie* (1884), 5 O.R. 603; *Drake v. Wigle* (1874), 24 C.P. 405; *Gower v. Eyre* (1815), G. Coop. 156; Amer. & Eng. Encycl. of Law, 1st ed. vol. 28, p. 871.

W. M. German, K. C., for the defendant, referred to *Lewis v. Godson* (1888), 15 O.R. 252; *Hughson v. Cox* (1873), 20 Gr. 238; *Bernard v. Gibson* (1874), 21 Gr. 195; *Armour on Real Property*, p. 109.

November 28. BOYD, C.:—All the niceties of the ancient learning as to waste which obtain in England are not to be transferred without discrimination to a new and comparatively unsettled country like this Province. It is no doubt laid down in the books that the tenant for life cannot cut down trees for repairs and sell the same, and that he must use the timber itself in making the repairs, and that the sale is waste: *Gower v. Eyre*, G. Coop., at p. 161. And this doctrine was reluctantly applied by Lord Thurlow in a case where the tenant felled timber and applied the produce instead; but he called it a hard demand and refused to give costs: *Lee v. Alston* (1789), 1 Ves.

Jr. 78, S.C. 3 Bro. C.C. 37. This case, however, turned very much on the pleadings, wherein the defendant admitted wrongful cutting. So in *Simmons v. Norton* (1831), 7 Bing. 640, and 5 M. & P. 645, at p. 660, the Court held that in the absence of a proper plea evidence could not be given that the tenant had bought and applied for repairs other timber bought with proceeds of the timber cut, which was unsuitable for the purpose. This line of defence may, however, even in England be set up by way of set-off in mitigation of damages, so that in a case of reasonable dealing of the tenant he may escape with nominal damages: see *Rennell v. Wither* (1818), Manning's Index of Cases, cited in *Bewes' Waste*, p. 54.

In England consideration is extended to ecclesiastical bodies—tenants for life—who are allowed not only to fell timber and dig stone to repair, but may sell such produce in order to expend the money in repairs: *Knight v. Mosely* (1753), Amb. 176, and *Wither v. Winchester* (1817), 3 Mer. 421. This may be explained on the grounds that proper reparation is essential for the proper use of the whole property, and that such cutting and selling and using the money on the dilapidated buildings is not "waste," but really going to the betterment of the whole property.

A like relaxation of the strict rule obtains in the United States, and the authorities of that country, so much alike in its territorial conditions to our own, may well be regarded by Canadian courts, as was done in *Drake v. Wigle*, 24 C.P. 405.

I am content to adopt the language of Mr. Justice Story as found in *Loomis v. Wilbur* (1827), 5 Mason 11, at p. 15. If the cutting down of the timber was without any intention of repairs but for sale generally, the act itself would doubtless be waste, and if so it would not be purged or its character changed by a subsequent application to repairs. But if the cutting down and sale were originally for the purpose of repairs, and the sale was an economical mode of making the repairs, and the most for the benefit of all concerned, and the proceeds were *bonâ fide* applied for that purpose in pursuance of the original intention, it does not appear to me possible that such a cutting down and sale can be waste. It would be repugnant to the principles of common sense that the tenant should be obliged to

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make the repairs in the way most expensive and injurious to the estate. See *Miller v. Shields* (1876), 55 Ind. 71.

In this case the life-tenant is the testator's widow, and the remaindermen are distant relatives. They complain of former cutting, but at so remote a period that I think it disadvantageous for all parties to entertain the complaint in that regard: *Bagot v. Bagot* (1863), 32 Beav. 509, at p. 519. The present complaint arises out of transactions whereby proper timber and shingles were to be obtained from a dealer, who was to take an adequate quantity of timber off the place in exchange, that on the place being unsuitable for the repairs needed. This was afterwards varied so that a sufficient amount of timber was to be sold to pay for the stuff required in repairing, but all connected with the one business of making repairs on the very old house and buildings. The executor, plaintiff, admits that the buildings are in need of repair (of \$200 or \$300 anyway), and the defendant's witnesses, who have examined with more care, say \$300 or \$400. On the present evidence there does not appear to me to be any case of waste made out to justify granting an injunction, nor nothing on which to award damages if the timber is cut with due regard to the situation of the bush and the cleared land, and no unreasonable amount is taken off to recoup the cost of timber and shingles used and to be used in the repairs.

If the parties are content to leave it at this, I would dismiss the action without costs—as the question is new in this country—but if either party seeks a reference as to what amount and in what localities timber should be cut, I will send it to the Master to direct proceedings, and reserve costs of the reference.

A. H. F. L.

[FALCONBRIDGE, C.J.K.B.]

1904

Dec. 23.

ATTORNEY-GENERAL FOR ONTARIO V. LEE ET AL.

Revenue—Succession Duty—"Aggregate Value" of Property—Incumbrances.

In establishing the "aggregate value" of the property of a deceased person under the Succession Duty Act, R.S.O. 1897, ch. 24, as amended by 62 Vict. (2) ch. 9, and 1 Edw. VII. ch. 8, the value of the land of the deceased, where such land is incumbered or mortgaged, is to be regarded, and not merely the value of deceased's equity of redemption therein.

A QUESTION of law raised by the pleadings in an action brought by the Attorney-General for the Province of Ontario, representing His Majesty the King and the Treasurer of the Province of Ontario, against Walter Cecil Lee and Charles Ernest Lee, executors and trustees under the will of Walter Sutherland Lee, deceased.

Walter Sutherland Lee died on the 4th January, 1902, having made his last will and testament whereby he gave all his property to the defendants in trust as therein more fully set out for the benefit of his widow and children, and in certain events of his grandchildren.

The defendants, who obtained probate of the will and entered upon the trusts thereof, filed with the registrar of the surrogate court of the county of York, as required by the Succession Duty Act and the regulations passed thereunder, the usual affidavit for succession duty purposes, known as an affidavit of value and relationship, in which they asserted that the aggregate value of the property of the deceased was at the date of his death \$95,482.45, and they contended that, as all his property was by his will given for the benefit of his widow, children, and grandchildren, and was not of an aggregate value in excess of \$100,000, no succession duty was payable thereon.

Amongst other assets left by the deceased were a number of parcels of real estate upon which there were mortgages for considerable amounts, and it was admitted by the defendants that if it should be found, as a matter of law, that with respect to such mortgaged realty the value of the land, and not merely the value of the deceased's equity of redemption therein, was

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to be taken in estimating the aggregate value of his property within the meaning of the Succession Duty Act, R.S.O. 1897, ch. 24, as amended by an Act respecting Succession Duties, 62 Vict. (2) ch. 9, and the Succession Duty Amendment Act, 1901, 1 Edw. VII. ch. 8,* then and in that case the aggregate value of the property of the deceased, within the meaning of the Acts, was in excess of \$100,000 in value, and that duty would be payable on what might be found to be the dutiable value of his property. A reference to ascertain the aggregate and dutiable values, respectively, was agreed to, no matter what the result of the legal question might be, as the value of the various assets had not been settled.

An order was made under Rule 373 for the separate trial of the question of law as to the meaning of "aggregate value," having regard to the incumbrances.

Argument was heard by FALCONBRIDGE, C. J. K. B., in the Weekly Court, on the 22nd December, 1904.

Frank Ford, for the plaintiff. The amendment of 1901, sec. 3 of 1 Edw. VII. ch. 8, which is applicable to the present case, makes it clear that with respect to mortgaged real estate what is to be taken in estimating the "aggregate value" is the value of the land, although for the "dutiable value" the mortgages would be deductible if within the terms of sub-sec. 4 of sec. 3 of 1 Edw. VII. ch. 8. The "aggregate value" is what is alone considered in ascertaining whether or not an estate is dutiable in the first instance and at what rate. The "dutiable

*By sec. 3 of the principal Act, R.S.O. 1897, ch. 24, the Act shall not apply (3) to property passing under a will "to or for the use of the father, mother, husband, wife, child, grandchild . . . of the deceased, where the aggregate value of the property of the deceased does not exceed \$100,000 in value.

By sec. 2, the word "property" includes real and personal property of every description, and every estate or interest therein capable of being devised or bequeathed by will or of passing on the death of the owner to his heirs or personal representatives.

By the Succession Duty Amendment Act, 1901, 1 Edw. VII. ch. 8, sec. 3, the 2nd section of the principal Act was amended by adding thereto certain sub-sections, the first of which is as follows: (2) The phrase "aggregate value" means the value of the property before any debts or other allowances or exemptions are deducted therefrom.

value" is what the duty is actually payable on. There is no attempt to "tax" the mortgage debt owing by the deceased. The amendment of 1901 was passed in consequence of the decision in *Ross v. The Queen* (1900), 32 O.R. 143, and makes it clear that the meaning of the Act is as was then argued on behalf of the Crown. "Aggregate value," a phrase which is used throughout the Act in dealing with what may be termed the \$100,000 and \$200,000 classes, is defined as the value of the property before any debts or other allowances or exemptions are deducted therefrom. The "exemptions" mentioned are simple, being gifts for religious, charitable, or educational purposes (R. S. O. 1897, ch. 24, sec. 3, sub-sec. 2), and the exemption provided for by sec. 4 (7). To find what are the "debts or other allowances" which are not to be deducted in estimating the "aggregate value," but which are to be deducted in determining the dutiable value, reference must be made to 1 Edw. VII. ch. 8, sec. 3 (4), where they are found to be "reasonable funeral expenses and debts and incumbrances," and where it is also provided that "any debt or incumbrance for which an allowance is made (*i.e.*, for determining the dutiable value), shall be deducted from the *value of the land* or other subjects of property." Compare sec. 7 of the English Finance Act of 1894, from which nearly the whole of the amendment of 1901 is taken, except that in that Act there is no distinct definition of "gross principal value." The difference between the wording of the Act in dealing, on the one hand, with the \$10,000 class of estates (R.S.O. 1897, ch. 24, sec. 3 (1), as amended by 1 Edw. VII. ch. 8, sec. 4, and R. S. O. ch. 24, sec. 4 (5), (6)), and on the other with the \$100,000 and \$200,000 classes (R. S. O. ch. 24, sec. 4 (3), (4)), is noticeable. See also sec. 17 of R.S.O. ch. 24. Even if it were not clear that for the aggregate value the "value of the land" is to be taken, the use of the words "debts or incumbrances," or either of these words, would be sufficient. The mortgagor, although he has parted with the legal fee, is the "owner of the property." The mortgagee is a creditor with a specific lien. The mortgaged property is only security for the debt. The mortgagee is a "mere incumbrancer," and the subject of property within the meaning of the Succession Duty Act is the land itself, subject

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to a debt. See Soward's *Estate Duty*, 4th ed., p. 163; Hanson's *Death Duties*, 4th ed., pp. 146 and 154; Coote on *Mortgages*, 7th ed., pp. 6-12; *Casborne v. Scrafe* (1737), 1 Atk. 603; *Attorney-General v. Worrall*, [1895] 1 Q.B. 99, at p. 104; *Blake v. Foster* (1813), 2 B. & B. 387, 402; Burton's *Compendium of the Law of Real Property*, 8th ed., p. 452; *Heath v. Pugh* (1881), 6 Q.B.D. 345, at pp. 359-61. The recent case of *Attorney-General v. Lord Montagu*, [1904] A.C. 316, so far as it can be said to be an authority at all, is in favour of the plaintiff.

W. R. Riddell, K.C., for the defendants. The meaning of the word "property" is defined by R.S.O. 1897, ch. 24, sec. 2, and the amendment of 1 Edw. VII. ch. 8, sec. 3, does not modify the definition of the word "property" in this section, but simply adds a sub-section defining the phrase "aggregate value." It will be seen by secs. 2, 3 (3), 4 (3), and other sections, that the word "property" in the statute is applied only to that which passes under a will, intestacy, or otherwise, and it is submitted that where there is real estate subject to a mortgage so much of the value of the real estate as is represented by the mortgage does not pass at all on the death of the owner of the equity of redemption. Admittedly, the amount of the mortgage is part of the estate of the mortgagee, and it is equally clear that the mortgagee has a legal estate. If both mortgagor and mortgagee were to die at the same time, the result of the plaintiff's contention would be that the amount of the mortgage would be included in each estate. The object of the amendment of 1 Edw. VII. was to meet the decision in the case of *Ross v. The Queen*, 32 O.R. 143, (1901), 1 O.L.R. 487, and full effect can be given to this by confining the amendment to the case of such debts as are referred to in that case. The contention of the plaintiff would result in many inconveniences and inconsistencies.

December 23. FALCONBRIDGE, C.J. (oral):— In estimating the aggregate value of the property of a deceased person under the Acts, upon the true construction of the statutory provisions referred to, and having regard to all the provisions of the Acts, the phrase "aggregate value" means the value of the property,

and not merely the value of the deceased's equity of redemption therein.

There will be a reference to the Master in accordance with the agreement of the parties, and further directions and costs will be reserved.

[The formal judgment, omitting preliminary recitals, was as follows :—

This Court doth declare that in estimating the aggregate value of the property of a deceased person within the meaning of the Succession Duty Act, R.S.O. ch. 24, as amended by the Act respecting Succession Duties, 62 Vict. (2) ch. 9, and the Act to amend the Succession Duty Act, 1 Edw. VII. ch. 8, the value of the land of the deceased, where such land is incumbered or mortgaged, is to be taken, and not merely the value of the deceased's equity of redemption therein; and that the aggregate value of the property of the said Walter Sutherland Lee, deceased, within the meaning of the said Acts, was at the date of his death in excess of \$100,000 in value, and doth order and adjudge the same accordingly.

And this Court doth further order and adjudge that it be referred to Thomas Hodgins, Esquire, Master in Ordinary, to ascertain the aggregate and dutiable values, respectively, of the said property and to fix and determine the amount to be paid thereon to the plaintiff for succession duty.

And this Court doth reserve further directions and the question of costs until after the Master shall have made his report.]

E. B. B.

Falconbridge,
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[IN CHAMBERS.]

Oct. 3.

Nov. 2.

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Practice—Discontinuing Action—Costs—Good Cause for Depriving Defendant of
—Con. Rule 430 (4)—Corresponding English Rule.

Plaintiff claiming that she was entitled to \$1,500—part of the moneys secured by two policies of \$500 and \$2,000 on her deceased husband's life—such amount being alleged to have been made over to her by her husband's dying declaration, her solicitor wrote to a brother of the deceased, the supposed holder of the policies, notifying him of the plaintiff's claim, whereupon a solicitor replied that his instructions were that the two policies were "originally and always payable" to the deceased's mother, and so formed no part of the deceased's estate. The plaintiff's solicitor then wrote to the mother, to which the same solicitor replied that he could not understand the ground of the plaintiff's claim, but if she desired to commence an action he would accept service. The plaintiff thereupon commenced an action which was defended by the said solicitor, but on the plaintiff subsequently discovering that the brother who had been first written to actually did hold the policies under an assignment from the mother, he wrote to the solicitor for his consent to discontinue the action without costs, and on this being refused, a motion therefor was made under Rule 430 (4):—

Held, that an order could properly be made for the discontinuance on the terms asked for.

Construction of Rule 430 (4) and difference in the corresponding English Rule pointed out.

Order of the Master in Chambers affirmed.

MOTION by the plaintiff under Con. Rule 430 (4) for leave to discontinue the action, and for an order that the defendant should pay the costs, or for such disposition of the costs as might seem proper.

Rule 430 is as follows:—

430 (1) Subject to any special statutory provisions, the plaintiff may, at any time before receipt of the statement of defence of any defendant, or after the receipt thereof before taking any other proceeding in the action (save an interlocutory application) by notice in writing, filed and served, wholly discontinue his action against such defendant or withdraw any part thereof; and the defendant shall be entitled to the costs of the action, if wholly discontinued against him, or if not wholly discontinued to the costs occasioned by the part withdrawn. A plaintiff may discontinue as to one or more of several defendants.

(2) Such costs may be taxed upon production of the notice served without any order, and if not paid within four days from

taxation the defendant may, without any order, sign judgment therefor.

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(3) Such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action.

(4) Save as in these rules otherwise provided, it shall not be competent for the plaintiff to discontinue the action without the leave of the Court or a Judge, but the Court or a Judge may, before, or at, or after the hearing or trial, upon such terms as to costs, and as to any other action against all or any of the defendants, and otherwise, order the action to be discontinued, or any part of the alleged cause of complaint to be withdrawn.

The facts, so far as material, are set out in the judgment.

The motion was heard before Mr. Cartwright, the Master in Chambers, on September 29th, 1904.

J. H. Spence, for the plaintiff.

Shirley Denison, for the defendant.

October 3. THE MASTER IN CHAMBERS:—The solicitors for the parties reside in different county towns. The evidence of the facts on which plaintiff relies is wholly documentary. Although affidavits have been filed on both sides, there is no conflict between them on any material point.

It is clear from *Huxley v. West London Extension R.W. Co.*, (1889) 14 App. Cas. 26, that the successful party cannot be deprived of costs unless there is good cause.

The question, therefore is:—Do the facts of this case establish the existence of such good cause?

To answer this question intelligently the facts must be stated at some length.

The plaintiff is the widow of defendant's son George, who died on the 1st October, 1903.

At the time of his death there were two policies on his life, one for \$500 and another for \$2,000. These were handed over after his death by the widow to her husband's brother Joseph. He afterwards sent her \$600, with which the funeral expenses of deceased and other liabilities were paid.

The widow was under the impression that she was entitled

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to receive \$1,500 from the proceeds of the insurances. In consequence, on 26th January, 1904, her solicitor wrote to Joseph Armstrong stating that the widow understood that her husband had policies of \$500 and \$2,000 respectively on his life, out of which, by his dying declaration and attempted disposition, she was to receive \$1,500, and that if these policies "were originally payable to deceased's mother," and were not altered by Mr. A., through illness and the reliance on the assurances that his wishes would be carried out, it would be a fraud upon his widow. To this letter the only reply sent was a letter from the solicitor who is acting for the defendant. It was as follows, and bears date 1st February, 1904:—

"*Re Estate of late George C. Armstrong.*

Dear Sir,

Your letter to Mr. Joseph D. Armstrong has been handed to me for reply and to inform you that there was no \$1,000 policy in force that he knows of on his late brother's life, but there were policies for \$500 and \$2,000, both of which were originally and always payable to his mother, and so formed no part of his estate. The \$600 was sent by Mr. Joseph D. Armstrong to his brother's widow as a matter of kindness on his part and out of sympathy to her, and not because of any responsibility to pay her anything."

On receipt of the above the plaintiff's solicitor wrote at once a letter bearing date February 4th, 1904, the material parts of which are as follows:—

"Dear Madam,

On instructions of Mrs. Claribel Armstrong, your daughter-in-law, I recently addressed to your son, Joseph D. Armstrong, a letter upon the subject of the remittance to my client of the further sum of \$900 due to her, to make up the \$1,500, which, by her husband's dying declaration, was set apart for her out of the \$2,500 of insurance he carried on his life. To that letter your solicitor has replied setting up the claim that all of the \$2,500 was by the terms of the policies payable to you, and I presume contending that for that reason my client could have no claim upon it.

If, as alleged, the policies provided that the insurance moneys when due thereunder should be paid to you, I must

take it that your son Joseph has been acting as your agent and under your instructions in the way he has dealt therewith, as he could only get possession of these funds through you."

To this letter a reply was sent by the same solicitor, dated 5th February, 1904:—

"*Re Estate George C. Armstrong.*

Dear Sir,

Your letter to Mrs. Mary Ann Armstrong has been handed to me. Of course, we cannot prevent your bringing an action, if so advised, although we cannot imagine the grounds upon which it is likely to be sustained. However, if you insist upon doing so, and send the writ to me, I will accept service and undertake to appear for the defendant."

On receipt of this the plaintiff's solicitor commenced the present action against the mother of her husband, relying on the statement made by her solicitor in his letter of 1st February, 1904, that there were policies for \$500 and \$2,000, both of which were originally and always payable to her. It was not until some time in June that it was discovered that the policies had been assigned to Joseph Armstrong, with the consent of the mother, to whom they were originally payable. Thereupon, the plaintiff applied to defendant's solicitor to be allowed to discontinue without costs. This was refused. The present motion is therefore necessary under Rule 430 (4).

It was strongly argued for the defendant that the plaintiff's solicitor was in fault in relying on the statements made by the other side. Mr. Denison pointed out that the true facts might easily have been obtained from the insurance companies, and the present mistake thereby avoided. It must be conceded that the defendant's solicitor might have declined to give any information and have advised plaintiff's solicitor to have applied elsewhere. This, however, he did not do. On the contrary, the language of his letter of 1st February is clear and unambiguous. There can be only one interpretation of the words that both the policies "were originally and always payable to the mother." After that had been received the plaintiff's solicitor wrote to the defendant stating that her present solicitor had written that the policies were payable to her. This letter was handed by the defendant to her solicitor, as he

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says, so that he knew the plaintiff's solicitor was relying on a statement made by him, which was incorrect. Whether he knew this to be so or not does not seem material. He cannot be heard to excuse himself in this way, so as to free his client from the responsibility arising from her erroneous instructions, to which alone his mistake must be attributed. It is to be observed that in this case there is no conflict as to what occurred between the parties. They and their respective solicitors lived in different towns, and, so far as appears, there was no interviews or conversations about which parties may, and often do, honestly differ. Here fortunately everything material is in writing, and the result which I have reached is that the plaintiff's motion should prevail, and that the action should be discontinued without costs to either party.

By the letter of 1st February plaintiff's solicitor was led to believe that the policies "were originally and always payable to the mother," not as he had thought (and rightly) to Joseph, as appears from the letter of the 4th February from plaintiff's solicitor to Mrs. Armstrong, the defendant.

I cannot but think that the incorrect statement of defendant's solicitor was the direct cause of the present action. He was not obliged to make any statement. But, having done so and misled the plaintiff, his client must not complain of the result of this motion. I cannot give plaintiff more, but I do not think her entitled to less.

From this judgment the defendant appealed to a Judge in Chambers.

On October 13th, 1904, the appeal was heard before ANGLIN, J., sitting in Chambers, when the same counsel appeared.

November 2. ANGLIN, J.:— Were it not for the great confidence with which counsel for the defendant pressed his argument in support of his appeal I should not have reserved judgment in this matter. As it is, I have carefully considered all the English authorities upon which he relied, and my view is, as it was upon the argument, that the English Rule, No. 290 (Order xxvi., No. 1), confers on the Court or a Judge full power

and discretion to deal with the costs of an action upon permitting it to be discontinued, as the learned Master has done in this case.

The Master in his written opinion obviously assumes the wording of the English Rule to be identical with our present Consolidated Rule 430 (4) as to discontinuance by leave, and the argument before me proceeded on the same assumption. A difference which if designed would be of the greatest significance seems to have escaped attention. The English Rule reads:—"Save as in this Rule otherwise provided, it shall not be competent for the plaintiff to withdraw the record or to discontinue the action without leave of the Court or a Judge, but the Court or a Judge may before, or at, or after the hearing, upon such terms as to costs, and as to any other action and otherwise (as may be just), order the action to be discontinued or any part of the alleged cause of complaint to be withdrawn."

The present Ontario Rule 430 (4), though otherwise substantially the same, omits the words "as may be just." Construing this Rule, as if this omission were intended, I would, in view of the retention of the word "such," read it as enabling the Court to order discontinuance only upon the terms as to costs mentioned in section (1) of Rule 430, which would absolutely entitle the defendant to his costs. I do not think Rule 1130 applicable in view of the express provisions as to costs in Rule 430, which forms a complete code of procedure governing discontinuance.

But upon examining the history of Rule 430, I cannot believe that the omission of words similar to "as may seem just" was designed. Rule 641 of the consolidation of 1888 contained the words "as may seem fit," immediately after the word "otherwise." Rule 431 of the present consolidation, dealing with withdrawal of defence or counterclaim, contains the words "upon such terms as may seem just." The corresponding Rule (No. 642) of the consolidation of 1888 contained the words "upon such terms as may be imposed." In Rule 430 (4), as now framed, no meaning whatever can be given to the words, "and otherwise," if the word "such" is to be read as relating to the foregoing parts of the Rule. I cannot but think that if it were intended to omit the words "as may seem fit,"

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the word "such" would also have been eliminated; and I therefore would read our Rule either omitting the word "such," or as if it contained the words "as may seem fit," or "as may seem just" immediately after the word "otherwise." So read, it, in my opinion, gives to the Master ample power for good cause to deprive a defendant of his costs where an action is discontinued by order made under that provision: *Musman v. Boret* (1892), 66 L.T. N.S. 171.

If this order be appealable, as to which I determine nothing, I am unable to say that the cause for which the Master in the exercise of his discretion refused costs to the defendant was not adequate.

The appeal will be dismissed with costs.

G. F. H.

[BOYD, C.]

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Dec. 15.

THE NASMITH COMPANY OF TORONTO, LIMITED.,

V.

THE ALEXANDER BROWN MILLING AND ELEVATOR
COMPANY, LIMITED.

*Statute of Frauds—Contract for Purchase of Flour—Letter Signed by Plaintiff
—Entry in Defendants' Book—Name of Defendants on Fly Sheet—Signature.*

The essence of signature whether made by writing or stamp or print must be to authenticate or identify the contract by the party to be charged.

In an action for breach of a contract in the form of a letter from the plaintiff to the defendant to "enter our order for two thousand barrels Prairie Rose Flour at \$4.10 per barrel . . . Cash discount $\frac{1}{2}$ of 1 per cent.—we to have option of another three thousand barrels . . . provided option is taken up by . . . Delivery as required," in which it was shewn that an entry was made in the defendants' contract book among other orders, "1903, Dec. 30. By 2,000 P. Rose, \$4.10, cash dis. $\frac{1}{2}$ of 1 per cent.," under the heading of the plaintiffs' company name and that the fly sheet of this book had the defendants' company name stamped on it, which had been put there some years before to mark the time when a newly organized company began operations:—

Held, that the contract was not proved according to the requirements of the Statute of Frauds.

ACTION for breach of contract to deliver 5,000 barrels of flour, tried at Toronto on the 1st of December, 1904, before BOYD, C., without a jury.

The plaintiff company sued on an order given to the defendant company in the following words:

"The Nasmith Co. of Toronto, Limited, No. 3091.

The Alexander Brown Milling Company,
Toronto,

Dear Sir,

Please enter our order for the following: (2,000)
Two thousand barrels Prairie Rose Flour at \$4.10 per barrel,
bags returnable at 5 cents each. Cash discount $\frac{1}{2}$ of 1 per cent.
We to have an option of another three (3,000) thousand barrels
same flour on same terms, provided option is taken up by the
evening of Tuesday, January 5th, 1904.

Delivery as required.

(Sgd.) The Nasmith Co. of Toronto, Limited,
Per John Turnbull,
Genl. Mgr."

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which order they alleged had been given to the defendant's traveller in the usual course of business, and had been verbally accepted by the president of the defendant company in an interview with the plaintiff's manager, subsequent to which the option was "taken up" by the following letter:

"Toronto, Can., January 5th, '03,

The Alexander Brown Milling Co.,
Toronto, Ont.,

Dear Sirs,

We herewith confirm our conversation with your Mr. Brown, sr., taking up our option for 3,000 barrels of Prairie Rose Flour as per our order to you of December 30th, 1903.

Yours truly,

(Sgd.) The Nasmith Co., Limited,

John Turnbull,

General Manager."

An entry was made in the books of the defendant company among other orders under the heading of "Nasmith Co., "1903, Dec. 30th. By 2,000 P. Rose, \$4 10, cash dis. $\frac{1}{2}$ of 1 per cent."

The other facts appear in the judgment.

Shepley, K.C., for the plaintiff company.

E. E. A. DuVernet and *Armour A. Miller*, for the defendant company.

December 15. *BOYD*, C.:—The contract sued on by the plaintiff is not proved as against the defendant according to the requirements of the Statute of Frauds.

The writings relied on are (1) the paper of 30th December, 1903, signed by the plaintiff and addressed to the defendant to enter order for 2,000 barrels of flour, and to have option for 3,000 barrels more with delivery as required, and (2) the entry made in the contract book of the defendants in these words, "1903, Dec. 30th, By 2,000 P. Rose, \$4.10, cash dis. $\frac{1}{2}$ of 1 per cent."

This appears as of a series of orders under heading on the page of "Nasmith Co.," and forms one item of an account which begins in the book in 1899.

On the fly sheet of the book is stamped the name of the defendant, "The Alexander Brown Milling and Elevator Co., Limited," with words in red ink above it, "New account, 1st June, 1902"—the whole surrounded with a circular flourish. The meaning of this is that the company changed its organization at the date mentioned. The book began in 1899 and was carried on as the book of the new concern, and that is why the name and date of the new company appear on the fly sheet.

But upon this name of the defendant thus appearing the plaintiff is obliged to stand as a sufficient signature within the meaning of the Statute of Frauds. The statement of the facts carries its own refutation of the name being stamped as a signature. Besides being placed there years before this transaction, it was not put there as in any sense a signature—but as a mark of time when the new proprietorship began.

The essence of signature whether made by writing or stamp or print must be to authenticate or identify the contract by the party to be charged.

The cases all shew that the signature must be substantially contemporaneous in the case of connected documents, and it will not do to import into the particular transaction a name previously written—as here, years before—with a totally different intent.

There may be, of course, recognition by subsequent signation of a bygone contract, or perhaps an anticipatory signature of a subsequent contract—but nothing such is proved here.

The latest case I have found is *Hucklesby v. Hook* (1900), W.N. 45, where other cases are collected and commented on.

In brief this printed name at the beginning of the book cannot be in Lord Ellenborough's phrase "appropriated" to the particular contract as a signature, and it was not placed there in recognition of the contract sued upon: *Schneider v. Norris* (1814), 2 M. & S. 286, at p. 289. See also *Evans v. Hoare*, [1892] 1 Q.B. 593; *Bluck v. Gompertz* (1852), 7 Exch. 862, at p. 866; and *Torret v. Cripps* (1879), 27 W.R. 706.

There are other formidable difficulties discussed in argument such as this: supposing sufficient connection between the documents, and that the stamped name were to be treated as a signature, what is authenticated thereby—a contract other

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than that sued upon, viz.: one for no more than the sale of 2,000 barrels at \$4.10 cash with cash discount.

The written evidence in this case if at all admissible as parts of one contract shews non-agreement on one essential point, *i.e.*, as to whether it was to be a time contract or one of delivery as required—upon which there is no satisfactorily proved consensus. The very object of the statute was to get rid of the conflicting evidence which arises upon the recollection of facts and their bias towards themselves in the absence of contemporaneous writing when the contract is made.

I dismiss the action with costs.

G. A. B.

[TEETZEL, J.]

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Sept. 1.

HARRIS V. GREENWOOD.

*Limitation of Actions—Promissory Note—Part Payment—Husband and Wife—
Payment by Husband Out of Wife's Moneys—Evidence of.*

A husband, who had authority from his wife to collect rents for her, and to apply the same as he saw fit, either for his own or her benefit, made payments on the joint promissory note of himself and his wife, but there was nothing to shew any specific application of any part of the moneys collected on the note, or her knowledge or consent :—

Held, that such payments could not be treated as part payments by the wife on the note, so as to operate as a bar to the running of the Statute of Limitations.

THIS was an action tried before TEETZEL, J., without a jury, at St. Catharines, on June 24th, 1904.

The action was upon a joint promissory note, made by W. W. Greenwood, since deceased, and his wife Mary J. Greenwood.

Judgment was entered by default as against the Toronto General Trusts Corporation, the administrators of the estate of W. W. Greenwood, deceased.

Amongst other defences, the defendant Mary J. Greenwood set up that the action was barred by the Statute of Limitations, to which the plaintiff replied that payments had been made on account within the six years from the accrual of the cause of the action.

E. E. A. DuVernet, and *J. H. Ingersoll*, for the plaintiff.

E. D. Armour, K.C., and *A. W. Marquis*, for the defendant Mary J. Greenwood.

September 1. TEETZEL, J.:—The defence chiefly relied upon was that of the Statute of Limitations; in reply to which the plaintiff proved several payments on account by W. W. Greenwood within six years of the commencement of the action; and the plaintiff sought to establish that these payments were out of money to which the defendant Mary J. Greenwood was entitled, and were made by her husband with her authority.

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In my opinion, the evidence falls short of establishing either that the payments or any of them were made out of the wife's money, with her knowledge and consent, or that in making any of the payments the husband was acting as her agent. The fact, which I find, that the husband had general authority to collect certain rents belonging to the wife, and was allowed by her without objection to apply the same either for his own benefit or hers, as he saw fit, would not, I think, constitute him her agent, so that by payments (out of the money so collected) on account of the note he could either continue or renew her liability upon a joint note which, but for such payments, would be barred by the Statute of Limitations.

Payments made by one of two joint makers will not take the case out of the statute as against the other, unless made expressly as his agent and by his authority: *Creighton v. Allen* (1867), 26 U.C.R. 627. See also *Paxton v. Smith* (1889), 18 O.R. 478.

While the husband did make collections for the wife, and did not account to her fully for same, there is no evidence that any part of such collections was ever specifically applied by him upon the note. It is, however, clear that if he did so apply same, it was without her knowledge or express consent.

While this note was outstanding, the husband caused to be conveyed to the wife several parcels of encumbered real estate, the equity of redemption in which would have been available in his hands to pay plaintiff; and while I must direct the action to be dismissed, I think under the circumstances it should be without costs.

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[IN THE COURT OF APPEAL.]

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Nov. 14.

Promissory Note—Illegal Consideration—Contract in Restraint of Marriage.

Plaintiff for several years had been housekeeper for a widower with a young daughter, and being about to be married, he promised her, if she would continue in his service as housekeeper so long as he needed her and abandon her contemplated marriage, he would either pay her \$1,000 in cash, give her a promissory note for \$1,500, or remember her in his will. The plaintiff thereupon abandoned the marriage and continued her service until her employer's death, which occurred four years afterwards, he, in the meantime having given her a note for \$1,500. In an action against his administrator on the note:—

Held, that the primary object of the agreement was the continuing in the intestate's service, the restraint of marriage being merely an incident thereto, and that, under all the circumstances, the restraint was not such an unreasonable one as could be said to be contrary to the policy of the law. Judgment of STREET, J., 6 O.L.R. 708, reversed.

THIS was an appeal by the plaintiff from the judgment of Street, J., who tried the action without a jury and dismissed it with costs.

The judgment is reported in 6 O.L.R. 708, *sub-nom Crowder v. Sullivan*.

From this judgment the plaintiff appealed to the Court of Appeal on September 27th, 1904, and the appeal was heard before OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A.

D. B. Maclennan, K.C., for the appellants. The only question which is now necessary to consider is whether the transaction leading up to the giving of the note was a contract in restraint of marriage. To constitute this a defence, it must be a contract in general restraint of marriage. Here, however, the agreement not to marry was not the consideration for the giving of the note, but merely an incident in it. The real consideration was the continuing in the deceased's service. There was a complete contract without any reference to the marriage. The contract must be construed by what took place in September, 1900, when the note sued on was given, and not so much to what occurred in 1897: *Beaton v. Springer* (1897), 24 A.R. 297. The cases referred to by the learned Judge at the trial are quite distinguishable. In *Low v. Peers* (1768), 4 Burr 2225, the contract

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was not only in general restraint of marriage, but that was the whole consideration, while *Hartley v. Rice* (1808), 10 East 22 was merely a case of bet or wager. The question there came up on demurrer, and the plea set up that the contract was in general restraint of marriage and no other consideration was shewn.

Clute, K.C., for the respondents. The evidence shews that the plaintiff was duly paid for her services as housekeeper, and the agreement not to marry was therefore the only consideration for the making of the note. It is a much stronger case than *Hartley v. Rice*, for in that case the agreement was limited to six years, while here no time is specified, and it is not only not to marry Levere to whom the plaintiff was then engaged, but not to marry any one else. This clearly amounted to an agreement in restraint of marriage. In addition to the cases relied on by the learned Judge, the law as contended for by the defendant is clearly laid down in the following authorities:—*Scott v. Tyler* (1788), 2 W. & T. L. C., 6th ed., 120, 185; *Young v. Furse* (1857), 8 DeG. M. & G. 756; *Baker v. White* (1690), 2 Vern. 215; *Robinson v. Ommanney* (1883), 22 Ch. D. 285; *Bellairs v. Bellairs* (1874), 18 Eq. 510; *Chalfant v. Payton* (1883), 91 Ind. 202, 46 Amer. R. 386; Story on Contracts, 5th ed., sec. 687, Story's Equity Jur., 6th ed., sec. 277-283; *Maine v. Towle* (1888), 80 Me. 287.

November 14. The judgment of the Court was delivered by GARROW, J.A.:—The action was brought to recover payment of the sum of \$1,500 and interest, being the amount of a promissory note for that amount made by one Albert Rose, deceased, of whose estate the defendant is administrator, dated September 19th, 1900, payable to the plaintiff three years after date, to which the defences pleaded were (1) absence of consideration; (2) illégál consideration; and (3) fraud in obtaining the said note.

The learned Judge found the issue upon the defence of fraud in plaintiff's favour, but held that the consideration was illegal, and for this reason dismissed the action. The facts appear to be as follows: Albert Rose was a farmer and a widower with one young daughter, when the plaintiff in or about the year

1890 entered his services as housekeeper at \$8 per month. She was then about 23 and he about 57 years old. He died on November 15th, 1901, and had been for the greater part of the last year of his life insane.

In the year 1897, the plaintiff was about to marry one Levere when it was agreed that if she would remain with Albert Rose as long as he wanted her—or as long as he lived, it is put both ways in the evidence, he would either give her \$1,000 in cash, his promissory note for \$1,500, or remember her in his will. The plaintiff gave up her proposed marriage and performed the agreement fully on her part. Albert Rose died intestate leaving an estate of about the value of \$15,000 to his only child, the daughter before mentioned, then of the age of about 15 years.

On September 19th, 1900, Albert Rose without any request from the plaintiff, made and gave her the promissory note now sued on, presumably in the performance of his part of the agreement before referred to, and in the following month of December became insane and so remained. The plaintiff had throughout been paid the original wage of \$8 per month.

The evidence shews very clearly that her services were highly prized by Albert Rose, and that to several of the witnesses, friends and neighbours, he had announced his intention to provide for her in recognition of her long and faithful services.

The learned Judge in his judgment says: "It appears, therefore, that the only consideration for the giving of the note was the agreement made in 1897. Put shortly that agreement was that if she, the plaintiff, would not marry Levere or any other man so long as deceased lived, but would remain with him during his life, he would do one or other of the three things above mentioned" (*i.e.*, give her \$1,000 in cash or a note for \$1,500, or make provision for her by will), "and the plaintiff claims that having kept her promise there was good consideration for the note. It is plain that this was not a mere matter of wages but a bonus to the plaintiff for abandoning her prospect of marrying during the life of the deceased, and instead remaining in the service of the deceased. The deceased at the time of the promise was about 60 years of age and apparently in excellent health. The

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plaintiff was at the time a young woman of the age of, I think, 28 or 30. I think this was a contract in restraint of marriage for an unreasonable period, and that the consideration for the note was therefore an illegal one, and that no recovery can be had upon it: *Lowe v. Peers*, 4 Burr. 2225; *Hartley v. Rice*, 10 East 22."

I think there are one or two slight omissions or perhaps they might be called inaccuracies in the learned Judge's summary. The first is in the statement that the bargain was specifically that the plaintiff would remain with deceased as long as he lived. The evidence given by the plaintiff on her examination for discovery used at the trial, and also upon her cross-examination at the trial, is that she promised to remain "as long as he needed me," and the statement that she would remain as long as he lived appears rather as an inference than as a fact expressly agreed upon.

On her cross-examination at the trial she says: Q. "You were examined for discovery as to the bargain, by Mr. Lawson the other day? A. Yes, sir. Q. Did you tell the truth about it? A. Yes. Q. This is what you say about that Q. Did you tell him who you were going to marry? A. Yes. Q. Who was it? A. Levi Levere. Q. He said he could not think of you getting married? A. Yes, he could not think of my leaving. He did not know what he should do. Q. He finally told you he would give you \$1,000, or \$1,500? A. Yes. Q. What were you to do in order to get this \$1,000? A. I was to remain with him, and I did so. Q. That is to say you were not to marry Levi Levere at that time? A. Yes. Q. If somebody else came along were you at liberty to marry. Was that part of the agreement? A. Yes—I was to remain and not get married to Levi Levere. Q. Nor any person else? A. Nor any person else while he needed me—and I did not. Q. There was no fixed time? A. No. Q. I want to be sure about this bargain because it differs a little from the way it was stated in your statement of claim. You say four or five years previous to the making of the note you were about to get married? A. Yes. Q. And you acquainted Mr. Rose with the facts? A. I did. Q. And he told you he could not hear of it? A. Yes. Q. And at that time, there was an agreement made between you, you were not to get

married to anybody as long as he needed you? A. Yes. Q. Is that all true? A. Yes."

And then counsel again reading from her examination for discovery at the trial: "Q. And you did not know how long you would have to stay with Mr. Rose? A. No—I did not know. Q. I suppose the intention was to stay during his lifetime? A. If he were living I would stay. A. That was the bargain, as long as he wanted you—you were to stay during his lifetime? A. Yes."

The other statement of fact which is not, I think, quite accurate is as to the age of Albert Rose, which the learned Judge puts at about 60 years when the bargain was made in 1897. Albert Rose died in November, 1901, and his brother Samuel who was examined at the trial, states that he was then of the age of 67 years. So that in 1897 his age was some three years greater than as stated by the learned Judge.

I cannot help feeling rather strongly that the defence is not a meritorious one. The plaintiff has fully performed the contract, and the intestate doubtless in giving his promissory note intended to perform his part. The defendant, it is true, is merely the administrator, and as such probably doing his duty in questioning as he has done the plaintiff's right to recover. But the defence is essentially a dishonest one and should only, in my opinion, succeed if it is established that the law has interposed an insurmountable barrier against her claim. The only general principle that I have been able to find is that a *general restraint* upon marriage is, on grounds of public policy void, and possibly a second, if isolated instances, may be trusted, that restraints which are not general but merely temporary or otherwise limited in their effect are not illegal unless unreasonable in extent. The present case falls within the second class as pointed out by the learned Judge.

If the contract had not involved the postponement or abandonment of plaintiff's marriage it would scarcely be contended that the contract was not an eminently reasonable and proper one. The deceased was a farmer carrying on a farm. He had no other housekeeper or female servant. He had a young motherless daughter to bring up. The plaintiff had been in his service for years when the bargain was made and had approved

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her skill and faithfulness. It was, apparently, therefore, a matter of prime importance to deceased under the circumstances to retain the plaintiff's services if possible, and at any reasonable price, at least until his daughter had grown older or his circumstances or mode of life had changed. There was the chance of his giving up farming (which actually happened shortly before his final illness) or even, at his age, of his marrying again; in either of which events the plaintiff's services might, and probably would have been dispensed with, and there was of course the other chance that he might not live long, and thus put a period to the restraint.

The parties were not bargaining expressly for a restraint upon the marriage, but, in substance, for the continued services of the plaintiff as housekeeper; and the temporary interference with her marriage was at most merely an incident, or collateral result.

But assuming that it had the effect and even that the parties had in contemplation a postponement of the plaintiff's marriage as long as Albert Rose required her services, up to, if he elected, the close of his life—this was at most only a temporary restraint and upon the authorities was not necessarily invalid. What is reasonable is not always easy to define. What I may regard as reasonable another with equal authority may regard as highly unreasonable. The question is usually one entirely of fact, and so for a jury where the trial is by a jury. But in another class of cases involving, like this, offences against what is called public policy, I refer to actions upon contracts in restraint of trade, the question has been called one of law and therefore for the Judge: See *Dowden & Pook, Limited, v. Pook*, [1904] 1 K.B. 45.

But whether the question is one of law for the Judge or of fact for a jury, the mode of treatment must be very much the same. There is no such thing in the abstract as reasonableness or unreasonableness. These terms can only have a meaning as applied to concrete circumstances. Then no two cases are wholly alike. Each has its own special atmosphere, so to speak, of reasonableness or the reverse arising out of the facts and circumstances, and for this reason former decisions must be at best but faint guides to what must in the end be declared upon its special facts to be the law in any given case. Perhaps, from this point

of view, the paucity of decisions, for there are not many, is an advantage, rather than the reverse. In the case of *Lowe v. Peers* referred to in the judgment, it was held that the contract amounted to a *general* restraint, and for this reason was void. In the other case referred to, *Hartley v. Rice*, the question arose upon demurrer. The restraint there was for six years but no facts to explain the reason or necessity for the limited restraint were stated, and it was held *in the absence of explanation* the restraint was illegal. But it is quite apparent from a perusal of the judgment that the decision would, or rather might, have been the other way if there had been a reasonable explanation to account for the restraint, so that the case is scarcely an authority against the plaintiff, but rather the reverse.

In the old case of *Box v. Day* (1744), 1 Wils. 59, the bond was conditioned that the female defendant would not marry anyone but the plaintiff, to whom she was then promised in marriage, and that she would pay £1,200 in case she married anyone else, or refused to marry the plaintiff within a month *after her father's death*. She did marry another in her father's lifetime and it was adjudged that the bond had been forfeited and that the money stipulated for was payable. No one suggested that the postponement of the marriage until after the father's death rendered the bond illegal.

In *Woodhouse v. Shepley* (1742), 2 Atk. 535, there were mutual bonds to marry within 13 months *after the decease of the young lady's father*, and the bond was relieved against, not as being contrary to public policy but as being a fraud upon the father who had disapproved of the match. And while neither of these cases can be said to be exactly in point, except in the similarity of the periods of restraint, the step from an engagement by a daughter not to marry in the lifetime of her father, to a similar engagement by a female servant not to marry in the lifetime of her master does not seem a long one.

Restraints which are combined with gifts by will or settlement are also, of course, distinguishable. It is not unreasonable that a donor should be allowed some freedom to stipulate the conditions upon which he is willing to make the proposed gift. There no question of the freedom of contract is involved. But such cases may properly enough be looked at, and when looked

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at it appears to me that they shew a movement always towards greater freedom from the trammels of so-called public policy in this connection. And as an instance, the case of *Allan v. Jackson* (1875), 1 Ch. D. 399, may not be without interest, where it was held that a restraint upon a man's second marriage was not illegal, it having been previously held that a similar restraint in the case of a woman was legal: see *Newton v. Marsden* (1862), 2 J. & H. 356; see also *Perrin v. Lyon* (1807), 9 East 170; *Jenner v. Turner* (1880), 16 Ch. D. 188; *Jones v. Jones*, (1876), 1 Q.B.D. 279; *Robinson v. Ommanney*, 21 Ch. D. 786, 23 Ch. D. 285.

Upon the whole I am, with deference and after much consideration, unable to agree that the restraint in question was under all the circumstances unreasonable, or that it in any way invaded the policy of the law. No decided case brought to my notice, or which I have been able to find, compels me to an opposite conclusion. I entirely approve in this connection of the language of Jessel, M.R., in *Printing and Numerical Registering Co. v. Sampson* (1875), L.R. 19 Eq. 462, at p. 465, where he says: "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice. Therefore, you have this paramount public policy to consider—that you are not lightly to tamper with the freedom of contract."

And in my opinion the appeal should be allowed with costs here and below, and the plaintiff should have judgment for the amount of the promissory note sued on and interest.

OSLER, J.A., took no part in the judgment.

G. F. H.

[IN THE COURT OF APPEAL.]

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COULTER V. THE EQUITY FIRE INSURANCE COMPANY.

Nov. 14.

Fire Insurance—Parol Contract—Interim Receipt Limiting Duration of Contract—Effect of—Incumbrance—Omission to Notify Company—Absence of Written Application with Questions and Answers—Materiality.

The plaintiffs on November 7th, 1901, applied through an agent of the defendants to their general manager for an insurance of \$2,800 for a year on certain machinery and stock in trade which he verbally accepted, and the usual interim receipt was issued by its terms limiting the insurance to thirty days, but of such limitation no notice in writing was given to the plaintiffs. On November 30th, the plaintiffs, in the belief that the insurance was for a year, paid the annual premium to the agent, who, according to his usual course, paid it over to the defendants in January following, when it was duly accepted by the defendants. No policy, however, was issued, and a fire subsequently occurring some ten months after, whereby the goods were destroyed, the defendants repudiated liability on the ground that the insurance was for thirty days only:—

Held, that there was a valid parol contract for insurance for a year, and that nothing subsequently took place to modify or impair it, the interim receipt under the circumstances not having such effect.

Held, also, that under the parol contract an implication was raised that a proper policy would be issued subject to the statutory conditions and such variations thereof as were just and reasonable, and that was substantially the effect of the interim receipt, which, though ineffective to restrict the duration of the contract, was to be looked at as part of the evidence surrounding it.

Under the first statutory condition the applicant for insurance is not to misrepresent or omit to communicate any circumstances material to be made known to the company to enable it to judge of the risk, while a variation thereof on the company's policies required the applicant to communicate the existence of a mortgage or other incumbrance and the amount thereof, and it was objected that the applicant had omitted to communicate the existence of a mortgage on the insured property whereby the insurance was vitiated:—

Held, that whether the first statutory condition was alone considered or the variation thereof, which was in effect the same, the object was to obtain information as to the risk before accepting it, which information is usually obtained by questions and answers in a written application, and as there was no such application here and no question put at all, either written or verbal, there was no duty imposed on the insured to communicate the fact of the existence of the mortgage; and *semble*, the existence of the mortgage was not, in the circumstances of this case, a fact material to be made known to the company.

Judgment of MEREDITH, C.J.C.P.. 7 O.L.R. 180, affirmed.

THIS was an appeal from the judgment of Meredith, C.J.C.P., at the trial, reported 7 O.L.R. 180.

The action was brought to recover the loss sustained by fire to the plaintiffs' machinery and stock in trade.

The plaintiffs, on the 6th November, 1901, made an application to John H. C. Durham, the manager of the Merchants' Fire

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Insurance Company, the head office of which was in Toronto, for an insurance of \$5,600 on the machinery and stock in trade. Durham, who did not wish to place the whole risk with his own company, and being also an agent of the defendant company, on the 7th November applied to the general manager of the defendant company for a yearly insurance for half of the amount, namely, \$2,800, which he accepted. The defendant company thereupon issued what is called an interim receipt, which was for thirty days, the premium being \$33.60, being at the rate of \$1.20 per hundred, which was handed to Durham, and which he subsequently handed over to the plaintiffs, informing them of the insurance having been effected, one-half with the Merchants' Company and one-half with the defendant company. No written application was made to the defendant company, but Durham drew up a memorandum in writing containing a description and classification of the property to be insured, which was given to the defendant company. On November 30th the plaintiffs gave Durham their cheque payable to the Merchants' Company for \$57.20 made up of the \$33.60, the amount of the premium payable to the defendant company, and \$28, the amount of the premium payable to the Merchants' Company. In January, 1902, Durham, as was his usual custom, furnished the defendant company with a statement of the amount of the premiums payable by him to the company, together with his cheque for the amount, which included the premium on the plaintiffs' insurance, which was duly deposited by the company with their bankers. In October, 1902, the fire occurred when the company denied any liability, contending that if there was any liability at all, the liability was only for the thirty days provided for by the interim receipt. This was the first knowledge the plaintiffs had that there was any question about the insurance being for a year. The plaintiffs' personal property was worth \$22,000 upon which there was a chattel mortgage of \$3,500, while the land was worth \$16,000. The fact of the mortgage was not communicated to the defendants.

The learned Chief Justice gave judgment in favour of the plaintiffs.

From this judgment the defendant company appealed to the Court of Appeal.

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On September 30th, 1904, the appeal was heard before MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A.

G. H. Watson, K.C., for the appellants. The question is whether the contract of insurance was limited to thirty days, or was in force for a year. There never was a contract for a year. The only contract ever entered into by the company was that contained in the interim receipt, namely, an insurance for thirty days. The defendants were not impressed with it, and when they looked into it they put an end to it, and so notified Durham, who was the plaintiff's agent in the transaction, and in no way represented the defendants who are therefore not responsible for his acts. The learned Chief Justice has found that the interim receipt limited the insurance to thirty days. He was, however, of the opinion that the application being for a year's insurance the policy to be issued should under the second statutory condition conform to the application, unless it is expressly pointed out in writing wherein it differs and that the interim receipt was a policy within the meaning of the Insurance Act, R.S.O. 1897, ch. 203, sub-sec. 2, but in *Parsons v. Queen Insurance Co.* (1881), 7 App. Cas. 96, it was held that the interim receipt being merely an agreement for interim insurance preliminary to the grant of a policy, is not a policy within the meaning of that term within the Act. The interim receipt however did expressly point out that it was limited to thirty days, and it is no excuse for the plaintiff to say that he did not read it, and did not know of its being so limited. Then the plaintiffs claim that the defendants are estopped by their conduct and dealings from denying that the insurance is for a year, and they rely on the alleged payment and acceptance by defendants of the premium for a year's insurance. Here it is proved that the defendants had cancelled the insurance and terminated the risk, and the fact of the amount of the premium being subsequently received by a clerk in ignorance of the fact of the insurance having been so cancelled, and that as soon as the defen-

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dants were made aware of this they at once notified the plaintiffs, cannot have the effect of creating an estoppel. Then as to the omission to disclose the existing incumbrance: this was clearly contrary to the condition. It certainly cannot be said that an incumbrance of \$2,500 is not a fact material to be made known to the defendants: *Reddick v. Saugeen Mutual Fire Ins. Co.* (1888), 15 A.R. 363; *Phillips v. The Grand River Farmers' Mutual Fire Ins. Co.* (1881), 46 U.C.R. 334.

W. R. Riddell, K.C., and *S. B. Woods*, for the respondents. There is no question that the application made to the company through Durham was for an insurance for one year, and this was verbally accepted by the general manager. There was therefore a completed contract for a year's insurance. The issue of the interim receipt by the defendants is merely the formal mode adopted of acknowledging the incurring of the risk. The interim receipt, however, as found by the learned Chief Justice, constitutes a policy within the meaning of the Insurance Act, R.S.O. 1897, ch. 203, sec. 168, sub-sec. 2. The *Parsons* case was decided under the Act of 1876, 39 Vict. ch. 24, sec. 1 (O.), but in 1882 the Act 45 Vict. ch. 21 (O.) was passed to meet the decision in that case, by sec. 3 of which the statutory conditions are made to apply to these receipts; and, in 1887, by the Act 50 Vict. ch. 20 (O.) it was further provided that no stipulation to the contrary or variation was to be binding on the assured unless evidenced as prescribed and these sections are consolidated in R.S.O. 1887, ch. 167, sec. 114, under which the *Dominion Grange Mutual Fire Ins. Association v. Bradt* (1895), 25 S.C.R. 154, was decided. There it was held that the effect of the statute was to make the interim receipt a policy, and subject to the statutory conditions. The section is the same in the present consolidation. The second statutory condition requires the company to point out in writing any change made from the application. This was not done here, and the evidence establishes, as the learned Chief Justice has found, that the plaintiff did not know that by the receipt the insurance was so limited; but in any event the defendants are estopped from setting up any such limitation, for the company received the premium for the whole year's insurance, entered it in their books, and in every way treated it as a pay-

ment for the year's insurance. The clerk to whom the payment was made was the official to whom payment might properly be made and the learned Chief Justice rightly held that the defendants were estopped from denying that there was not a valid insurance for a year. Then as to the chattel mortgage, the omission to notify the company can only be of importance when it is a fact material to be made known to the company. Here the property was worth \$17,000, and it is quite clear, under the circumstances brought out in the evidence, that the fact of the property being incumbered, to the extent of \$2,500 would in no way affect the risk, and was not, therefore, material to be made known to the defendants.

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November 14. The judgment of the Court was delivered by GARROW, J.A.:—The learned Chief Justice apparently found upon conflicting evidence clearly involving the question of credibility that the defendants accepted the plaintiffs' application for an insurance for one year at a premium agreed upon and paid, and with that finding, so based, we cannot, or at least ought not, in this Court to interfere.

The transaction took place at the defendants' head office with their general manager, and the proposal and acceptance followed by payment of the premium under such circumstances were, although by parol, quite sufficient to constitute a valid and binding contract of insurance capable of enforcement: *Perry v. Newcastle District M. F. Ins. Co.* (1852), 8 U.C.R. 363; *Jones v. Provincial Ins. Co.* (1859), 16 U.C.R. 477; *London Life Ins. Co. v. Wright* (1880), 5 S.C.R. 466, 513; Porter on Insurance, 3rd ed., 1898, p. 21; Joyce on Insurance, 1897, vol. 1, sec. 31 *et seq.*; R.S.O. 1897, ch. 203, sec. 2, sub-sec. 37.

Formerly, of course, the remedy would have been in equity to compel delivery of a policy and consequential relief; but now, since the Judicature Act, all the Courts have equitable jurisdiction and are bound to act upon and enforce equitable as well as legal rights.

Assuming then that there was a binding contract to insure for one year, the burden was clearly upon the defendants to shew that something had occurred after that contract was made to modify or end it before the fire, which took place within the year, and in that I think the defendants entirely fail.

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The only thing affecting the plaintiffs to which the defendants point is the fact that an interim receipt valid only for 30 days (for that, I think, is its proper construction) was issued to and received by the plaintiffs. This receipt, however, was issued apparently as matter of routine by an under officer of defendants. It is on the usual printed form, and was not passed upon nor required to be passed upon by the general manager who had just made the parol contract. It was, it is true, received by the plaintiffs, but the evidence shews, and the learned Chief Justice has found, that they did not observe that it by its terms might modify the earlier parol contract. And after they received it they paid the full year's premium. So long as the question was contract or no contract the fact that an interim receipt in this limited form had issued was of prime importance, the argument by the defendants being, of course, that it and it alone created the only contract between the parties. But beginning, as I think we must, with a finding in plaintiffs' favour that there really was the completed prior parol contract, the importance of the interim receipt at once practically ceases, because in such case, and upon this branch, its only use must be as shewing or tending to shew that the plaintiffs had agreed to accept it in performance of or substitution for the larger contract, a contention for which there is, in my opinion, no foundation.

The remaining question is as to the effect of the plaintiffs' failure to disclose the encumbrance upon their property at the time of the application for insurance.

The parol agreement, apart from the interim receipt, included, in my opinion, as a term to be necessarily implied to carry out the intention of both parties, that a proper written policy would issue in due course. And I also think, differing in this respect to some extent from the opinion of the learned Chief Justice, that the plaintiffs were only entitled to claim and the defendants bound to tender a policy in the usual form then used by them, that is, a policy subject to the statutory conditions and to such variations of these conditions, properly printed, as were just and reasonable: *Citizens' Ins. Co. v. Parsons* 7 App. Cas. 96, at pp. 126, 127; *Eureka Ins. Co. v. Robinson* (1867), 56 Penn. St. 256, at p. 264; *De Grove v.*

Metropolitan Ins. Co. (1875), 61 N.Y. St. 594, at p. 602; *Newark Machine Co. v. Kenton Ins. Co.* (1893), 50 Ohio St. 549, at p. 556; *Smith v. State Ins. Co.* (1884), 64 Iowa St. 716, at p. 718.

There is in this case, as in the *Parsons* case, an interim receipt which states that the insurance is "subject to the terms and conditions contained in the policies of the company at the date hereof." And while in my opinion the receipt is insufficient to cut down the contract to an insurance for 30 days only, it is still a part of the evidence surrounding the making of the contract and may be properly referred to upon this subject, and it apparently supports the implication to which I have referred. Indeed, such implication seems to be absolutely necessary in the plaintiffs' interest. There is certainly nothing to suggest, but quite the contrary, that the defendants at all events ever intended anything but their usual contract as set forth in their usual policy, with the result that but for the implication in question it might and perhaps should be properly held that there never was a complete contract in which the minds of the parties had fully and completely met.

The point, however, is not, in my opinion, important, or at least decisive in this case in the view I take of the effect of the variation relied upon. The variation is to the first statutory condition and requires the applicant to communicate the fact of any mortgage or other incumbrance and the amount thereof on the insured property and is properly printed on the defendants' policies then in use, in red ink.

It is, I think, a question of some nicety whether the language of the variation really adds anything to the statutory condition, which requires the insured not to misrepresent or omit to communicate *any circumstance* which is material to be made known to the company in order to enable it to judge of the risk it undertakes. "Any circumstance" is a large enough expression to include if necessary the words added by the variation, "mortgage, execution, or other encumbrance and the amount thereof on the insured property." The matter in either event to be communicated is one which is *material to the risk*. So that the construction would be apparently the same whether the general words only of the statutory condition are employed

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or the more amplified and specific language of the variation is used. In either case the fact communicated or omitted to be communicated must be one "material to be made known to the company in order to enable it to judge of the risk it undertakes." And in this case, and on the evidence, I would without hesitation hold that the existence of the encumbrance in question was not a fact material to be made known to the defendants. And even if the proper conclusion be that the variation has added something "just and reasonable" to the statutory condition, the result should still, I think, be the same.

The object plainly expressed, reading the whole condition originally, or as varied or attempted to be varied, is to obtain information *before accepting the risk* to enable the company to judge of the risk *about to be undertaken*. Such information is usually obtained by answers in writing to questions in a written application, although, doubtless, verbal questions and answers would serve the purpose, and if no questions are asked it is to be assumed, in the absence of course of fraud, that the company is willing to accept the risk without such information, or that the company has otherwise satisfied itself as to the title.

There was here no written application and no questions or answers, written or verbal, and there was, therefore, in my opinion, no duty to communicate, within the meaning of the condition and variation.

See *Klein v. Union Fire Ins. Co.* (1882), 3 O.R. 234.

The appeal should be dismissed with costs.

G. F. H.

[DIVISIONAL COURT.]

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Nov. 26.

HOPEWELL V. KENNEDY.

Defamation—Privilege—Privileged Statements Made at Public Meeting—Letter to Newspaper in Reply—Justification—Counterclaim.

Statements made at a public meeting by an alderman of a city, in his capacity as a member of a public library committee, reflecting on the manner in which the defendant, a contractor for the stone and mason work of a public library, was performing his contract, are *prima facie* privileged, and such privilege is not taken away by reason of there being present, to plaintiff's knowledge, newspaper reporters who, without any request from the plaintiff, published in their newspapers a report of what had taken place at the meeting, including the plaintiff's statements, and therefore did not constitute any justification for a letter written by defendant to such newspapers vindicating his character, and in which a defamatory attack was made on the plaintiff.

A counterclaim, referring to the charges in the statement of defence, and alleging that they were falsely and maliciously spoken by plaintiff, was held to be a good pleading under Rule 268.

THIS was an appeal from an order of His Honour Judge McTavish sitting at the Ottawa Spring Assizes for the assize Judge.

The action was for libel. When it was called for trial and before a jury was empannelled, counsel for the plaintiff moved to strike out paragraphs 5, 6, 7, 8 and 9 of the defence, also the counterclaim. Judgment on the motion was reserved, and the trial postponed, and afterwards the order was made, following *Murphy v. Halpin* (1874), Ir. R. 8 C. L. 127, the defendant having leave to amend.

From this judgment the defendant appealed to a Divisional Court, and the appeal was heard before MEREDITH, C.J.C.P., MACMAHON, and TEETZEL, JJ., on October 25th, 1904.

H. M. Mowat, K.C., for defendant, appellant. The plaintiff knew that the reporters were present at the meeting for the purpose of furnishing reports for their newspapers of what took place at the meeting. He therefore knew that what he said would be fully reported, and he made the statements with that knowledge, so that he knew they would not be confined to those present at the meeting, and whom he might have the right to address on the subject. He was therefore responsible for the

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publication and any privilege he had was removed. This therefore gave the defendant the right to justify himself in these newspapers, and in doing so to make a counter attack on the plaintiff: *Odgers on Libel*, 3rd ed., 253, 263; *Pierce v. Ellis* (1856), 6 Ir. C.L.R. 55; *Parsons v. Surgey* (1864), 4 F. & F. 247; *Simpson v. Downs* (1867), 16 L.T.N.S. 391. In any event the facts pleaded may be looked at in mitigation of damages: *Odgers on Libel*, 3rd ed., p. 270; *Fraser on Libel*, 3rd ed., 134.

No one contra.

November 26. TEETZEL, J.:—Plaintiff was an alderman of the city of Ottawa and as such was a member of the building committee of the public library, and the defendant was the contractor for the stone and mason work of the library building.

The libel complained of was in a letter written by defendant to the editor of the *Ottawa Evening Journal* and published in that paper on the 23rd of October, 1903, in which, after calling attention to certain statements, made by the plaintiff at a certain meeting of the said committee criticising the work upon the library building, he proceeds to charge in effect that the plaintiff was actuated by spite and bigotry; that he was himself an incompetent mechanic, mentions certain buildings put up by the plaintiff "of which he ought to be ashamed," alleges that plaintiff owed defendant an account which he had to force him to pay; that plaintiff was always in a quarrelling mood, and that "if the like of Alderman Hopewell is a fit man to inspect my work, it is time I quit building."

The paragraphs struck out charge that the plaintiff at said meeting, well knowing the public character thereof, and that the proceedings thereat would be duly reported in the public newspapers, made several serious charges in respect of the manner in which defendant was carrying out his contract, alleging that the work had an appearance of "botch work," and that "the hand of a mechanic did not show in any of it;" that in making the charges the plaintiff claimed to be specially qualified to make the same by reason of being himself a public contractor; that the said charges were duly reported in the public newspapers, especially the said *Evening Journal*, and

became and were matters of great public interest; that if the defendant wrote the said letter it was addressed to the editor of said newspaper and was published to the said editor and in said newspaper by defendant as he might lawfully do in reply to the charges so made by plaintiff and published in said newspaper, and *bonâ fide* for the purpose of vindicating his character against the plaintiff's attack, and in order to prevent the plaintiff's said charges from operating to his prejudice, and in reasonable and necessary self-defence and without malice, and that the occasion is therefore privileged.

In his counterclaim the defendant repeats the above allegations, and says that the charges so made by the plaintiff were falsely and maliciously spoken and published of the defendant, in the way of his trade and as a building contractor.

The point involved in the appeal is whether the above facts as pleaded constitute a privileged occasion and therefore, in the absence of express malice, a defence to the action.

It will be observed that it is not alleged by the defendant that plaintiff procured or caused his remarks at the committee meeting to be published in the newspapers, but in paragraph four he says that the meeting was open to the public and was attended by the reporters of the leading newspapers in Ottawa for the purpose of reporting the proceedings at said meeting in their respective papers, and in paragraph five charges the plaintiff with knowing that the proceedings thereat would be duly reported in said newspapers.

I take it to be well settled that where a person publishes in a newspaper statements reflecting on the conduct or character of another the aggrieved party is entitled to have recourse to the same paper for his defence and vindication and may at the same time retort upon the assailant when such retort is a necessary part of the defence, or fairly arises out of the charges made by the assailant, and in so doing if he reflects upon the conduct and character of the assailant it is for the jury to say whether he did so honestly and in self defence or was actuated by malice. See *O'Donohue v. Hussey* (1871), Ir. R. 5 C.L. 124; *Dwyer v Esmonde* (1878), Ir. L.R. 2 Q.B.D. 243. In each of these cases both publications appeared in different issues of the same newspaper. See also Odgers on Libel, 3rd ed., p. 253; Folk-

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ard on Libel, 6th ed., p. 278. Except in *Laughton v. Bishop of Sodor and Man* (1872), L.R. 4 P.C. 495, I have found no case in which such a defence has been allowed where the defamation complained of by the defendant consisted of oral statements made by plaintiff at a public meeting in the presence of reporters who, without being expressly required to do so, published such statements in their newspapers, but I do not think the *Laughton* case an authority for the defence in this action by reason of the special and extraordinary conditions involved in it.

I think this case comes squarely within *Murphy v. Halpin* Ir. R. 8 C. L. 127, cited by the learned county Judge. In that case, at p. 136, Fitzgerald, B., says: "As to the case of *Laughton v. Bishop of Sodor and Man*, . . . it seems to me sufficient to say that, as to the point in question here, it has no bearing either on the present case or on that of *O'Donohue v. Hussey*. The main question here, is as to the corresponding interest of the defendant, and the persons (the public) to whom he addressed his communications in the subject matter. The defendant cannot make it out here, because he wants what existed in *O'Donohue v. Hussey*,—the appeal of the plaintiff to the public. In the case cited (the *Laughton* case) the corresponding interest was founded, not on the act of the plaintiffs, but on the relation between a bishop of the Established Church and the clergy and laity of his diocese." See further at p. 139.

In *Murphy v. Halpin* the action was for writing to the editor of a public newspaper imputing to the plaintiff untruthfulness and discreditable conduct in his position as a poor law guardian, and the defendant pleaded that certain false and defamatory statements were made by the plaintiff at a meeting of the board of guardians about the defendant, well knowing that the same would be, and for the purpose of having the same published in the said newspaper, which statements were in pursuance of plaintiff's intentions so published, and that the defendant in his own defence, etc., wrote and published the letter complained of *bonâ fide*, believing the same to be true and without malice. A demurrer to this defence was allowed.

In discussing *O'Donohue v. Hussey* and the proposition of law in support of which it is above cited, Dowse, B., at p. 138,

says: "I have to follow the law so laid down, but I will be no party to its extension; and it is a matter of satisfaction to me that the other members of this Court have expressed a similar opinion. This plea is an avowed attempt to extend the principle of that case; and I know not where that principle would stop if it were allowed to be extended for the future at the rate at which its extension has been attempted in the instance now before the Court. The plaintiff is a member of a public board. He addressed the board at a meeting at which the representatives of the press attended. He knew that if he spoke at the meeting his speech would be reported, or the substance of it given, if the proprietor or editor of the newspaper thought fit to do so; but the speaker said nothing that it was not his duty as a guardian to say, and for that he complains that he has been libelled in the public press. Imagine the results that would flow from the extension of such a doctrine in a city like this, where there are so many public boards, at which speeches are delivered in the presence of reporters, and published in the daily newspapers. Imagine anybody who may think himself aggrieved by what is said on such an occasion, conceiving himself at liberty to resort to the public press to blacken and defame the speaker's character by imputations of insolvency, and by raking up and publishing all the speaker's antecedents, mercantile, political, or social. What satisfaction would it be to the victim of all this publicity to be told that he could succeed in an action if he proved express malice against his libeller? I will be no party to such a decision, which would in effect repeal an older law than even the common law of England—the law that forbids us to answer railing by railing."

I adopt the language of the learned Baron as singularly applicable to the chief conditions of this case. It was the duty of the plaintiff as a member of the building committee to honestly criticise at meetings of the committee the workmanship of a building under its charge, and if such criticisms were not made in good faith and defendant felt aggrieved thereby he could either resort to an action, or communicate to the committee and such other persons as may have heard plaintiff's criticisms, his defence thereto, accompanied with such retort upon plaintiff as may have been necessary as a part of his defence or

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fairly arising out of any charges made by plaintiff, and if in such retort defendant had reflected upon the conduct or character of plaintiff it would be for a jury to say whether defendant acted in good faith and in self defence, or was actuated by malice. But in my opinion he had no right to publish his defence and retort to the general public through the newspapers. In other words, the public as a whole, unlike the members of the committee and such other persons who chanced to hear the plaintiff, had no corresponding interest with the defendant in the subject matter. The plaintiff made no appeal or communication *to the public*, and in my opinion it is not open to the defendant to enlarge the constituency created by the plaintiff, and claim "privileged occasion."

While I am clearly of opinion that the facts set forth in the five paragraphs in question establish no defence on the ground of privilege, I think many of them would be admissible in mitigation of damages, and limited to that purpose may be pleaded. The principle upon, and the limitation within, which evidence of prior defamation by plaintiff of defendant may be given in mitigation of damages are clearly set forth in the judgment of Meredith, C.J., in *Stirton v. Gummer* (1899), 31 O.R. 227, wherein the authorities on the subject are fully reviewed.

It is also well established that facts to be given in evidence in mitigation of damages in a libel action must be set out in the statement of defence: *Beaton v. Intelligencer Printing, etc., Co.* (1895), 22 A.R. 97. While I agree with the learned county court Judge in the substance of the order made by him as to the statement of defence, I think it would have been better to have struck out only that portion of paragraphs 8 and 9 in which the defendant claims that "the occasion is therefore privileged," and allow him to substitute therefor the words "and the defendant pleads the aforesaid facts in mitigation of damages," but the leave given to amend fully protects the defendant.

As to the counterclaim, the learned Judge was of the opinion that as the occasion on which plaintiff is charged with defaming defendant was *prima facie* a privileged occasion the counterclaim should have shewn in what respect the plaintiff exceeded his privilege. With much respect, I think the

reference in the counterclaim to the charges as set forth in the statement of defence, and the further allegation that such charges were falsely and maliciously spoken by the plaintiff, are quite sufficient to make the counterclaim in its present form a good pleading within Rule 268.

It is never necessary or even permissible to set out the evidence by which malice is to be established at the trial: see *Glossop v. Spindler* (1885), 29 Sol. J. 556; Odgers on Libel, 3rd ed., p. 556.

I think, therefore, the appeal should be allowed as regards the counterclaim and dismissed as regards the statement of defence. If the defendant desires to amend his defence, he should do so within five days. No costs of appeal or order appealed from.

MEREDITH, C.J., and MACMAHON, J., concurred.

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Jan. 4.

[DIVISIONAL COURT.]

NELSON ET AL. V. LENZ.

Division Courts—Attachment of Debts—Jurisdiction—Garnishee out of Province—“Carrying on Business”—Assignee of Fund Attached—“Intervener.”

A person living in the United States entered into a contract in Ontario for the building of a house upon land owned by his wife. It was shewn also that he acted as his wife's agent in affairs relating to this property and other property in Ontario, all situate within the territory of a certain division court, process from which was issued against him as garnishee:—

Held, that the evidence did not shew that he was carrying on business in the division, within the meaning of sec. 190 of the Division Courts Act, R.S.O. 1897, ch. 60.

Held, however, STREET, J., dissenting, that, as the garnishee had submitted to the jurisdiction of the division court, a person holding an equitable assignment from the primary debtor of a part of the fund sought to be garnished, could not effectively intervene under sec. 193 and defeat the garnishing proceedings by shewing that the Court had no jurisdiction over the garnishee.

APPEAL by the primary creditors in a garnishing plaint in the 7th division court in the county of Essex from the judgment of the Judge presiding in that Court, determining that the garnishee, R. A. Newman, who resided in the city of Detroit, but was alleged to carry on business at Windsor, in the county of Essex, was not subject to be made a party to garnishee proceedings.

The garnishee himself submitted to the jurisdiction. The objection that the garnishee did not reside nor carry on business within the territory of the division court was raised by an “intervener,” one McKee, a creditor of the primary debtor, from whom he had obtained an equitable assignment of a portion of the primary debtor's claim against the garnishee.

The facts are stated at greater length in the judgments.

The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., STREET and BRITTON, JJ., on the 5th October, 1904.

C. A. Moss, for the primary creditors.

W. H. Blake, K.C., for the intervener.

January 4. STREET, J.:—The garnishee, R. A. Newman, and his wife, live in Detroit; Mrs. Newman owns in her own

right farm and other property in the county of Essex, some of which is rented and some of which is farmed; R. A. Newman acts as agent for his wife in managing her property, and he employs O. E. Fleming, a solicitor practising in Windsor, to collect rents and superintend repairs, make leases, etc., for which services a fixed sum is paid him. R. A. Newman entered into a contract in his own name with the primary debtor Lenz for the building by Lenz of a house on Mrs. Newman's property, upon which \$667.09 remains due to Lenz. Lenz is indebted to a number of persons to the amount of between \$800 and \$900. Fleming, as solicitor for all these creditors, excepting the intervener McKee, took garnishee proceedings under sec. 190 of the Division Courts Act, and accepted service for the garnishee Newman. McKee has intervened and contested the right to take these proceedings, on the ground that Newman neither resides nor carries on business within the jurisdiction of the 7th division court, and that therefore the proceedings taken cannot be sustained.

Section 190 of the Division Courts Act, R.S.O. 1897, ch. 60, gives jurisdiction in garnishee proceedings to the division court of the division in which the garnishee *lives or carries on business*.

The garnishee is R. A. Newman, and it is admitted that he lives in Detroit, so that there is no jurisdiction unless he can be shewn to "carry on business" in the limits of the 7th division court of Essex, within the meaning of the section.

He does not appear to have any property of his own in this Province, but he looks after his wife's property as her agent: Mr. Fleming, a solicitor at Windsor, assists in looking after the property, but he as well as Dr. Newman acts as agent for Mrs. Newman. If any of the three persons, Fleming, Newman, and Mrs. Newman, carry on business in Windsor or Essex, it would appear to be Mrs. Newman, for all the business done relates to her property and is done by her agents. The only transaction entered into by Dr. Newman in his own name appears to be the contract for the building of the house in question upon a piece of Mrs. Newman's property. That, so far as appears, is an isolated transaction, and the entering into the contract, especially when the circumstances shew that in doing it he was

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only acting as agent for his wife, does not constitute a carrying on of business, within the meaning of the words used.

I think the appellants are confusing the meaning of the expression "carrying on business" with that of "transacting business," which is a very different matter. No doubt, Dr. Newman and Mr. Fleming both transact business within the 7th division court limits: but when it is asked what is the business which Dr. Newman carries on within those limits, the answer must be that he carries on no business there.

See *Smith v. Anderson* (1880), 15 Ch. D. 247, 258; *Singleton v. Roberts* (1894), 70 L.T. 687; *Baillie v. Goodwin* (1886), 33 Ch. D. 604; *In re Wallis* (1885), 14 Q.B.D. 950; *Graham v. Lewis* (1888), 22 Q.B.D. 1.

The next question is, whether the intervener is entitled to take the objection that the Court had no jurisdiction to make the order in favour of the primary creditors for payment by the garnishee, when the garnishee has authorized an agent in the jurisdiction to accept service for him, and has admitted that he owes the primary debtor a sum sufficient to pay the primary creditors' claim.

The primary creditors not having a judgment can proceed in the division court to garnish a claim only under the authority of sec. 190 of the Division Courts Act. No division court has jurisdiction under that section unless the garnishee lives or carries on business within the limits of the division. Jurisdiction is not conferred upon a division court under this section by the mere fact that the garnishee, being found within the limits of the division, has been there served with a garnishee summons. The only provision for the taking of proceedings against garnishees living outside the Province is that which relates to corporations having agents within the Province. There is no provision under which an individual who neither lives nor carries on business within the Province can be made a party as garnishee. The primary creditors, the garnishee, and the intervener having appeared in Court before the Judge, the evidence shewed that the garnishee lived in the city of Detroit, Michigan, and did not carry on business in this Province, and the Judge, having so found, decided that he had no jurisdiction, and refused to make the order asked for, that

the primary creditors should be paid their claim by the garnishee.

In my opinion, the learned Judge was right in holding that he had no jurisdiction, and was bound so to decide when the facts appeared.

The intervener was a creditor of the primary debtor, and had obtained from him an equitable assignment of a portion of the debtor's claim against the garnishee. The primary creditors in this proceeding and two other creditors had taken garnishee proceedings for amounts sufficient in the aggregate to absorb the whole debt due by the garnishee to the debtor. These proceedings were prior in point of time to the assignment held by the intervener. If these garnishee proceedings are allowed to stand, then the intervener can take nothing by his assignment; if they are held to be without jurisdiction, then the intervener's assignment will be good.

Where the question of jurisdiction is only one between different division courts, and the objection is only that the action is brought in the wrong division, the absence of any notice disputing the jurisdiction is, by the terms of the Act, sufficient to give jurisdiction to the Court in which the action is brought. Here, however, there was no jurisdiction in any division court: there was no necessity for any notice disputing the jurisdiction. The garnishee was entitled to set up the facts as an answer to the claim of the primary creditors against him, and the intervener has the same right under sub-sec. (1) of sec. 193 * of the Act. In my opinion, the fact that the Court had no jurisdiction was a defence, within the meaning of that section, which the intervener had a right to set up, and it was also just cause why the debt sought to be garnished should not be paid over to the garnishee.

*In cases under this Act . . . the primary debtor, the garnishee, and all of the parties in any way interested in or to be affected by the proceeding, shall be entitled to set up any defence, as between the primary creditor and the primary debtor, which the latter would be entitled to set up in an ordinary action, and also any such defence as between the garnishee and the primary debtor, and may also shew any other just cause why the debt sought to be garnished should not be paid over or applied in or towards the satisfaction of the claim of the primary creditor.

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I am of opinion, for these reasons, that the appeal should be dismissed with costs.

BRITTON, J.:—If the objection in this case was taken by the garnishee himself, that he did not carry on business within the limits of the 7th division court in the county of Essex, within the meaning of sec. 190 of the Division Courts Act, I would, upon the evidence, sustain that objection. The question of carrying on business or transacting business in any particular place is one of fact, and one of degree. A business may be carried on by a person in one place, which is but a small part of a business carried on by the same person in another place, or a small business may be carried on in one place by a professional man having a large practice in another place.

Here the garnishee by his attorney admits that he does carry on business in the county of Essex, and he voluntarily submits to the jurisdiction of the Court. I see no reason why he has not the right to do this. He admits that he is indebted to the primary debtor, in reference to work done by the primary debtor in that county, in a certain sum, and he is willing to abide by the decision of the Judge of the court in which the action is brought as to the person to whom that money shall be paid.

I am unable to come to the conclusion that McKee, a creditor of the primary debtor, who intervenes, has shewn "any just cause why the debt sought to be garnished should not be paid over or applied in or towards the satisfaction of the claim of the primary creditor."

The facts are not in dispute. The garnishee is a physician practising medicine in Detroit. His wife is the owner of land in Essex, upon which the primary debtor, for her, erected a residence. The garnishee apparently made the contract in his own name, and by his attorney and agent in Windsor transacted the business, and now admits personal liability for all that was done. All parties to these proceedings agree in this, and so the husband, as debtor to Lenz, is made garnishee. The amount owed by the garnishee is a substantial one. Nelson & Brother, primary creditors, on the 1st January, 1904, obtained an order from their debtor upon the garnishee, for

\$182, amount of their claim. This order was not accepted, and the primary creditors put the claim in suit against the primary debtor and garnishee, and service was made upon the attorney and agent at Windsor of the garnishee. Mr. McKee heard of these proceedings, and, being a creditor of Lenz, applied for and on the 12th February, 1904, obtained an order for \$175.76. This order he presented, but it was not accepted. On the 25th February, 1904, McKee obtained from Lenz an assignment of \$175.76 as a portion of the debt due by the garnishee to Lenz.

In the suit proceedings the garnishee raised no objection to the jurisdiction of the Court, but regularly appeared by his attorney, and admitted an indebtedness of \$667.09.

In these circumstances, can McKee, as one intervening, do, as against the primary creditors, what the garnishee has not done, and what, in my opinion, he had a right to refrain from doing?

Assuming that McKee is a party interested in these garnishee proceedings, he is entitled, under sec. 193, to set up any defence as between the primary creditor and primary debtor which the latter would be entitled to set up in an ordinary action, and also any such defence as between the garnishee and primary debtor, and "may also shew any other just cause why the debt sought to be garnished should not be paid over or applied in or towards the claim of the primary debtor." The mere fact that McKee is a creditor of Lenz, and has an accepted order for the amount of his claim upon the garnishee, is not, in my opinion, a just cause. If it is in the power of the garnishee to submit to the jurisdiction of the Court, then an intervener ought not to be allowed, in his own interest, but to the prejudice of the primary creditor and against the wish of the garnishee, to say that the Court shall not entertain such jurisdiction.

If McKee, by his assignment, of which it appears the garnishee had notice, has acquired any rights against the garnishee, he can enforce these.

If the garnishee proceedings are void for want of jurisdiction, it may be that they will not protect the garnishee in paying over this money. That is a matter between the garnishee and the primary debtor, or between the garnishee

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and McKee, but it ought not to be raised as between the primary creditors and garnishee, unless by the garnishee himself. "Just cause" is said to be "substantial reason in law," and it means a good and substantial reason as against these primary creditors, who are entitled to their money and to the fruits of proceedings regularly taken, and without objection by either the primary debtor or garnishee.

If any question arises as to priority of McKee over any primary creditor, or as to his being entitled to the money under his assignment, it may be that he can apply under sec. 200.

This is a case of jurisdiction of the person, and it is a jurisdiction which may be acquired by "voluntary appearance either in person or by attorney:" see *Am. & Eng. Encyc. of Law*, 2nd ed., vol. 17, p. 1064: *Preston. v. Lamont* (1876), 24 W.R. 928.

I think the appeal should be allowed with costs.

FALCONBRIDGE, C.J.—I agree with my brother Britton's reasoning and conclusions in this case. The appeal is, therefore, allowed with costs.

T. T. R.

[DIVISIONAL COURT.]

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Dec. 30.

Negligence—Building Contract—Fall of Wall—Architect.

The defendants, being desirous of building a mill, obtained from the owner of a mill of the desired character in the same vicinity the plans used by him which had been prepared by architects of high standing, and then proceeded to build in general accordance with these plans, employing an experienced builder. There was contradictory expert evidence as to the mode of construction and as to the doing of mason work in winter. After the walls and roof had been completed machinery was being brought into the building through large door openings left unclosed for that purpose. The wind during a violent storm, rushing in through the openings forced off the roof and the walls fell, the plaintiff's husband, who was working at the building being killed:—

Held, that leaving the openings was not under the circumstances a negligent act, and that there was no liability in that respect.

Held also, that there was no liability because of the mode of construction, even if defective, there being no patent defect or anything in the nature of a trap, an owner (in the absence of something of that kind) being entitled in carrying on building operations to rely on the plans of qualified architects and the skill of competent builders, and not being bound at his peril to acquire the technical knowledge necessary to enable him to decide as to the plans and nature of the work.

Judgment of TEETZEL, J., affirmed.

APPEAL by the plaintiff from the judgment at the trial.

The plaintiff was the widow and administratrix of one J. S. Valiquette, and brought the action to recover damages in respect of the death of her husband, a boilermaker, who, while working for a contractor at a boiler-house in course of erection for the defendants Fraser & Co., was killed by the falling of a wall of the building. The accident took place in the Province of Quebec. There is no Act in that Province corresponding to the Workmen's Compensation for Injuries Act, but it was admitted at the trial that the law of the Province of Quebec was to be treated as identical with that of the Province of Ontario in other respects.

The defendants Fraser & Co., who were lumber manufacturers, being desirous of building, in connection with a new mill, a house to shelter their boiler from the elements, adopted the plans of another boiler-house which had been built in the same locality for the St. Anthony Lumber Company, and which, being in a very similar position to that intended to be built by

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Fraser & Co., had been standing for seven or eight years. They procured from the St. Anthony Lumber Company the plans of their building, which had been prepared by architects of repute; they sent their men to examine the building, and then they proceeded to erect their own building upon the same plan and almost of the same dimensions. The site was near a lake, and one end of the building faced the lake and was exposed to the winds with a clear sweep of several miles. The roof was of a different shape to that of the St. Anthony Lumber Company's roof, but was attached to the walls in the same manner, and the evidence shewed that a slight increase in the height of the Fraser & Co.'s gable—rendered necessary by the greater pitch of the roof—was compensated for by the addition of some pilasters to the walls. The contractor, Garvock, to whom the contract for the brick work was let, was a man of considerable experience and of good repute, and the superintendent of the work, one Proper, had had many years' experience in the building of mills.

The fall of the wall was caused by a violent storm of wind on the 7th of August, 1903, and the action was brought against the owners of the building and against the contractor for the brick work.

The plaintiff claimed damages upon the ground that the plan upon which the building was erected was faulty because the walls were not braced and were not of sufficient thickness to stand the force of winds at that point; that the mortar used by the contractor was of poor quality; that the walls were put up in frosty weather and were without proper cohesion; and that the roof should have been anchored into the brick work of the walls by bolts, instead of being secured merely by its own pressure upon them and by the brick work which was built round the ends of the purlines resting upon the top of the gable. It was shown, however, that the construction adopted was exactly that which had been adopted by the St. Anthony Lumber Company in their building. At the time the accident happened the building was still in the hands of the contractor. The walls and roof had been completed, but workmen were at work upon a sawdust carrier in the boiler-house. Some openings for doors at the exposed end of the building had not yet

been fitted with doors. A number of architects were examined as experts; their opinions as to whether the plan of the wall gave a sufficient margin of safety were widely apart. Its sufficiency was strenuously asserted by those who testified for the defence, and vigorously assailed by those on the other side. In support of the theories of the defence was the fact that a similar building under similar conditions had stood for seven or eight years; against them was the fact that the building in question had given way under the pressure of the storm. The evidence as to the quality of the mortar used by the contractor was equally contradictory.

The trial began at Ottawa on the 31st of March, 1904, before Teetzel, J., and a jury, but, after the trial had gone on for some time, the jury was, upon the application of the defendants, discharged. Judgment was delivered on the 11th of July, 1904, dismissing the action: see 4 O.W.R. 60.

The plaintiff's appeal was argued before a Divisional Court [FALCONBRIDGE, C.J., K.B., STREET, and BRITTON, JJ.] on the 29th and 30th of November, 1904.

J. Lorn McDougall, for the appellant. The learned Judge having found that the wall was not sufficiently strong to withstand such wind pressure as might be looked for, and that the wind was not of extraordinary violence, there is *prima facie* liability, and the learned Judge has erred in holding that, notwithstanding these findings, the defendants were not liable because they had relied on plans prepared by architects, and had entrusted the work to a competent builder. They are bound at the least to take the best available means and to employ competent men, and this they have not done. The work was being done in the winter, and it did not need any technical training on the part of the defendants to know that special care should have been exercised. The mortar which they allowed to be used was of inferior quality, and the roof was not safely and properly fastened to the walls, and there was no system of inspection. Even if the defect was of such a nature that inspection would not have discovered it, the defendants cannot escape liability. The deceased was on their premises at the request of their agent, and they became responsible for his safety. The building

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was in the nature of a trap, and the principle of cases of that kind applies: Pollock on Torts, 6th ed., p. 489; Singleton on Negligence, pp. 48, 83; *Francis v. Cockrell* (1870), L.R. 5 Q.B. 184, 501; *Sharp v. Grey* (1883), 9 Bing. 457; *Burns v. Cork and Bandon R.W. Co.* (1862), 13 Ir. C.L. 543; *Great Western R.W. Co. v. Braid* (1863), 1 Moo. P.C.N.S. 101; Thompson on Negligence, p. 963. The jury should not have been discharged. While there is power to discharge a jury it is a power that should be very sparingly exercised, and there was nothing to justify its exercise here. There is no analogy between a case of this kind and a case against a medical man: *Marks v. Town of Windsor* (1889), 17 O.R. 719; *Town v. Archer* (1902), 4 O.L.R. 383.

Aylesworth, K.C., for the respondents. There is nothing in the objection as to the discharge of the jury. There was much contradictory expert evidence of very special character, and the Judge was justified in deciding to try the case himself. In so doing he came clearly within the principle laid down in *Marks v. Town of Windsor*. See also *Brown v. Wood* (1887), 12 P.R. 198. On the merits the judgment is right. It has been held that the defendants took all reasonable means to insure the safety of the building, and that is the limit of their liability. It is not at all like the case of a known danger or a concealed trap. At the most, even if the contention of the appellant as to the facts is given effect to, there was merely a latent defect. The defendants were entitled to rely on the sufficiency of the plans prepared by experienced architects, and they employed a competent builder to put up the building in accordance with those plans, and did not attempt to prevent him from using proper materials. It is not made out as a fact that there was any defect or that materials of poor quality were used, and it is really impossible to decide satisfactorily on the evidence what the cause of the collapse of the building was. There is strong evidence to support the view that the storm in question was of exceptional violence, and the learned Judge has erred in holding the contrary. Even if, however, the finding that the storm was not of exceptional violence is accepted, liability has not been made out. Probably the accident resulted from the openings having been left in the walls in order to

allow the machinery to be brought into the building. It was not unreasonable to leave the openings for this purpose, and the defendants are not responsible in damages because an unexpected accident has resulted. There was no contractual relationship between the deceased and the defendants. The measure of their duty towards him was limited. They had no knowledge of any danger and no reason to apprehend danger, and, having exercised reasonable care they cannot be held liable. *Lane v. Cox*, [1897] 1 Q.B. 415, is in principle not distinguishable. See also *Crafter v. Metropolitan R.W. Co.* (1866), L.R. 1 C. P. 300; *Searle v. Laverick* (1874), L.R. 9 Q.B. 122.

McDougall, in reply.

December 30. The judgment of the Court was delivered by STREET, J. (after stating the facts as above set out):—A very careful perusal of the evidence has led me to the conclusion that the collapse of the building was probably caused by the fact that the storm came upon it in its unfinished state. The wind—a very violent one—rushed into the building through the openings left for doors, and lifted the roof: and the wall, having no support at the top, was forced over by the pressure of the wind. The evidence of Proper gives reasons for not having doors fitted to the openings: the openings were being used for bringing in large pieces of machinery in connection with the construction of the boiler. I think his explanation affords a sufficient reason for not having these openings closed by doors at the time: and I do not think that it was incumbent upon him to incur the inconvenience of temporarily closing them with planks, because it was within the possibilities that such a storm might overtake them. The question is whether it was his duty as a reasonably prudent man to have kept these openings blocked up with planks at all times when they were not in actual use by the construction boilermakers at work there, lest an unusually severe storm should suddenly obtain entrance and force off a roof weighing 18 tons. I think the plaintiff has failed to shew any actionable negligence on the part of the defendants in this or in any other respect: *Pearson v. Cox* (1877), 2 C.P.D. 369.

The highest ground upon which the plaintiff can put the

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liability of the defendants Fraser & Co. is that the deceased was lawfully upon premises owned and occupied by them, and that they owed a duty to him to see that due care had been exercised in the construction and maintenance of the building in which he was lawfully at work: *Indermaur v. Dames* (1866), L.R. 1 C.P. 274, (1867), L.R. 2 C.P. 311; *Marney v. Scott*, [1899] 1 Q.B. 986.

The defendants Fraser & Co. were not insurers of the safety of the workmen employed at the building, nor bound by any implied guarantee to them that it was absolutely safe. Guarantees which are implied are not to be extended beyond those implications which are reasonable under the circumstances. It would be an unreasonable implication that a landowner putting up a building upon his land who has let the contract for it according to a plan prepared by a reputable and experienced architect to a reputable and experienced contractor, is bound to acquire the technical knowledge necessary to enable him to pronounce upon and approve or reject the plans of the architect and the work of the contractor upon pain of being held guilty of negligence. It would be unreasonable, because it is entirely contrary to established usage and practice for an owner to attempt to acquire the complete professional knowledge of the principles of architecture and construction which would be necessary to enable him to deal with the subject before he could venture to put up a building for his own use. The universal practice is for the owner to employ persons whose professional training is supposed to fit them for the purpose; and when due care has been taken in the selection of persons to draw or approve of proper plans and to do the work without interference or stint, the duty of the owner in general has been performed, unless special circumstances not appearing here impose upon him higher obligations: *Black v. Ontario Wheel Co.* (1890), 19 O.R., 578; *Searle v. Laverick*, L.R. 9 Q.B. 122: compare *Francis v. Cockrell*, L.R. 5 Q.B. 501, 508.

Even, therefore, upon the assumption that the construction of the walls did not afford the margin of safety required by the rules upon which such buildings should be erected, or that the manner in which the roof was attached to the walls might have been improved upon—those were matters upon which experi-

enced architects and practical builders are not in accord, and the owner can not consistently with the principles upon which liability is founded be held answerable. They are matters of strictly technical knowledge, and he is obliged to rely upon persons whose business it is to possess it. If the alleged defect were one not requiring that knowledge, but patent to any ordinary person, such as an open trap-door, or an unfenced opening in his building, different considerations would be properly applied. This is in effect the rule laid down in *Indermaur v. Dames*, L.R. 1 C.P. 274, L.R. 2 C.P. 311, viz., that a person lawfully on the premises on business and not as a mere licensee is entitled to expect that the occupier shall use reasonable care to prevent damage from unusual danger which he knows, or ought to know.

I find nothing in the cases decided since *Indermaur v. Dames* extending the rule there laid down, although the language used in some of them must be limited by the facts with regard to which it is used. The cases are well grouped, and a comparison is invited by the grouping, in vol. 19 of *Ruling Cases*, p. 4, *et seq.*, and p. 60, *et seq.* The rule in *Indermaur v. Dames* is, of course, not applicable to all circumstances, and the liability of an owner or occupier may be much extended, where, for instance, a duty to the public, statutory or otherwise, is involved, as in *Tarry v. Ashton* (1876), 1 Q.B.D. 314, and *Britton v. Great Western Cotton Co.* (1872), L.R. 7 Ex. 130, or where, for a valuable consideration, something is supplied by the defendant to be used by the plaintiff for a particular purpose, as was the case in *Francis v. Cockrell*, L.R. 5 Q.B. 501: see p. 508, where the rule is formulated.

In my opinion the appeal should be dismissed with costs.

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[DIVISIONAL COURT.]

Dec. 28.

HAMMOND V. GRAND TRUNK RAILWAY COMPANY.

Master and Servant—Negligence of Servant—Injury to Third Person—Scope of Employment.

A watchman was employed by the defendants to lower bars or gates across the highway at each side of a crossing on the approach of trains, and to raise them as soon as the trains had passed, the gates being lowered and raised by means of a lever which was some distance from them. While a train was passing and the gates down, the plaintiff, a lad of sixteen, and two other lads, climbed or leaned upon one of the gates, and the watchman was prevented by their weight from raising the gates after the train had passed. In order to get them off he threw a cinder towards them, which struck the plaintiff in the eye, destroying the sight:—

Held, that, this act having been done not of mere malice or ill-will or to punish the plaintiff, but for the purpose of warning him to get off the gate, and so of enabling the watchman to perform the duty required of him, the defendants, his employers, were responsible in damages.

APPEAL by the defendants from the judgment at the trial.

The action was brought by George Hammond, an infant under the age of twenty-one years, by Elizabeth Hammond, widow, his next friend, and the said Elizabeth Hammond, against the Grand Trunk Railway Company and Horace Jarman, to recover damages for an injury sustained by the infant plaintiff at the hands of the defendant Jarman under the following circumstances.

The line of the Grand Trunk Railway Company crosses Queen street at the western outskirts of the city of Toronto, and bars crossing the highway, two or three feet above the level of the highway, are lowered when a train is approaching, so as to prevent traffic from proceeding along the highway crossing until the train has passed, when they are raised.

The defendant Jarman was the watchman employed by the railway company at the crossing, and his duty was to raise and lower the bars by means of a lever at the watchman's house or shelter close to the crossing. At the point in question the railway tracks run east and west, and the watchman's lever is on the north side of the track. On the 16th of July, 1903, the infant plaintiff, who was then about sixteen years of age, with two other boys was coming along Queen street from the south, and found the bars down and a train approaching; they all

leaned on the gate and watched the train pass, and as they followed it with their eyes they felt the jar of the bars caused by the effort of the defendant Jarman, the watchman, to raise them. They did not immediately remove their weight from them, and Jarman picked up a cinder and threw it towards them and struck the infant plaintiff in the eye, putting it out.

The action was tried before Anglin, J., with a jury at the Toronto Autumn Assizes, on the 20th of September, 1904, and resulted in a verdict for the infant plaintiff for \$800 against both defendants. The action was dismissed so far as the claim of Elizabeth Hammond was concerned.

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The appeal was argued before a Divisional Court [FALCONBRIDGE, C. J. K. B., STREET, and BRITTON, JJ.] on the 28th of November, 1904.

W. R. Riddell, K.C., for the appellants. The gate-keeper's act was entirely unauthorized and outside the scope of his employment, and the defendants are not liable. *Limpus v. London General Omnibus Co.* (1862), 1 H. & C. 526, is relied on, but that case is distinguishable. In that case the driver was doing a lawful act, namely, driving along the highway, and did that lawful act negligently. That case would apply if in this instance the gate-keeper had been negligent in the mode of raising the gates and the boy had been injured in that way. In *Ward v. London General Omnibus Co.* (1873), 42 L.J.C.P. 265, the defendants were held liable for the act of one of their drivers in striking a man with a whip, but the decision turned on the fact that the whip with which the blow had been struck had been given to the driver partly for the purpose of protecting the omnibus, and there was in that case clear evidence of negligence, the wrong person having been struck. *Lamb v. Palk* (1840), 9 C. & P. 629, shews the fine distinction which runs through the cases. In that case the coachman whose act was complained of had temporarily left the carriage, and it was held that he was not at the time he did the act in the employment of the defendant. See also, as examples of the same principle of distinction, *Ellis v. Turner* (1800), 8 T.R. 531; *Green v. London General Omnibus Co.* (1859), 7 C.B.N.S. 290, at p. 302; *Lyons v. Martin* (1838), 8 A. & E. 512; *Thames*

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Steamboat Co. v. Housatonic R. W. Co. (1855), 24 Conn. 40; *Church v. Mansfield* (1850), 20 Conn. 284; *Allen v. London and South Western R. W. Co.* (1870), L.R. 6 Q.B. 65; *Richards v. West Middlesex Waterworks Co.* (1885), 15 Q. B. D. 660, at pp. 663-4; *Charleston v. London Tramways Co.* (1887), 4 Times L.R. 157; *Bank of New South Wales v. Owston* (1879), 4 App. Cas. 270; *Hanson v. Waller*, [1901] 1 K. B. 390; *Coll v. Toronto R. W. Co.* (1898), 25 A. R. 55, at p. 64. In 3 Elliott on Railroads, sec. 1265, many of the American cases are collected, but these have to be read with caution for most of them are cases of passengers and turn upon the principle adopted in many of the American Courts of holding railways responsible to the fullest extent for the protection of their passengers. But it may be useful to refer to *Louisville, etc. R. W. Co. v. Douglass* (1892), 11 Southern Rep. 933; *Golden v Newbrand* (1879), 35 Am. Rep. 259; *Stephenson v. Southern Pacific R. W. Co.* (1892), 27 Am. St. Rep. 223; *Williams v. Pullman Palace Car Co.* (1888), 3 Southern Rep. 631. The act complained of is one which the defendants could not under any circumstances have lawfully done themselves, and they cannot be made liable because their servant has done it: *Coll v. Toronto R. W. Co.*, 25 A. R. 55, at p. 64; *Poulton v. London and South Western R. W. Co.* (1867), L. R. 2 Q. B. 534. In *Giblan v. National Amalgamated Labourers' Union*, [1903] 2 K. B. 600, a distinction is made as to the liability in respect of a matter of this kind between a union or aggregation of individuals and a limited company. When the *Limpus* case and other of the early cases against the London Omnibus Company were decided, that organization was in effect an aggregation of individuals, and was not a company in the strict sense, having limited corporate powers. In this case all the shareholders in the defendant company could not by concerted action have lawfully authorized the gate-keeper to throw a cinder at the boy, and therefore the act was one which was entirely outside the corporate powers of the company, and one for which they could not directly or indirectly be made liable. It is important to note also in this case that the act complained of was done in the public highway, and was therefore in itself an unlawful act. See *Harrison v. Rutland*, [1893] 1 Q. B. 142,

and the cases referred to in the notes to *Ware v. Barataria and Lafourche Canal Co.* (1840), 35 Am. Dec. 189.

R. C. Clute, K.C., and *E. G. Morris*, for the respondent. The act was done in the immediate discharge of the gate-keeper's duty, and this fact distinguishes the case from many of the cases in which the defendants have escaped liability. The fact that the act was in itself illegal and wilfully done does not excuse the defendants. It was the gate-keeper's duty to raise the gates, and he has done in an illegal way what he would have been justified in doing in a legal way. The result is just the same as if he had gone to the gate and pulled the boy off with unnecessary force. Many of the cases are referred to in *Smith's Master and Servant*, 5th ed., pp. 300-1-2. It is there pointed out that *Lamb v. Palk*, so much relied on, has been overruled by *Page v. Defries* (1866), 7 B. & S. 137. The manner of doing the act—the raising of the gate—was wrongful, but the act itself was lawful. The distinction is very clearly pointed out in *Coll v. Toronto R.W. Co.*, 25 A.R. 55, at p. 60. See particularly the case there referred to of *Bayley v. Manchester, etc., R.W. Co.* (1872), L.R. 7 C.P. 415, (1873), L.R. 8 C.P. 148. See also *Ferguson v. Roblin* (1888), 17 O.R. 167; *Dyer v. Munday*, [1895] 1 Q.B. 742; *Croft v. Alison* (1821), 4 B. & Ald. 590; *Smith v. North Metropolitan Tramways Co.* (1891), 55 J.P. 630.

Riddell, in reply.

December 28. The judgment of the Court was delivered by STREET, J. (after stating the facts as above set out):—The defendant Jarman was employed by the defendants, the Grand Trunk Railway Company, to lower the bars across the highway as a train was approaching, and to raise them as soon as it had passed. This duty carried with it that of warning persons who were obstructing the raising or lowering of the bars, and thereby preventing him from using them for the purpose for which they were required. The infant plaintiff was obstructing the raising of the bars, and the defendant Jarman threw a cinder at him, or in his direction, and put out his eye. This was an act for which the defendants the railway company might or might not be answerable. If the act were done out

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of mere malice and ill-temper, and to punish the boy, the railway company would not be answerable; but if it were done for the purpose of warning him to get off the bars so that they might be raised, then it is clear that they would be answerable, although the act done was a tort: *Bayley v. Manchester R. W. Co.*, L.R. 7 C.P. 415; *Seymour v. Greenwood* (1861), 6 H. & N. 359; *Dyer v. Munday*, [1895] 1 Q. B. 742; *Richards v. West Middlesex Waterworks Co.*, 15 Q. B. D. 660; *Coll v. Toronto R. W. Co.*, 25 A.R. 55.

This distinction was clearly put before the jury by my brother Anglin in his charge. He said to them: "Now, what was the object with which Jarman threw that cinder? If he threw it in a moment of irritation—annoyed at the boys being on the gate—not for the purpose of getting them away, so that he could open the gate, but simply to gratify some spiteful feeling of his own against the boys, then it was not an act done in the course of his employment, and the railway company would not be responsible for it. If, on the other hand, his object was not to hit the boy but to attract his attention and get him away from the gates so that they could be opened, you will probably come to the conclusion that he did it in the course of his employment—the opening of the gate—and if you reach that conclusion then that makes the employers liable for the act which the servant did."

Upon this charge the jury found for the plaintiff, and they must be taken to have found, as they might properly do upon the evidence, that the act done by Jarman was done in the course of his employment.

In my opinion the charge and judgment were right, and the present motion should be dismissed with costs.

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[DIVISIONAL COURT.]

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Dec. 30.

*Malicious Prosecution—Proof of Favourable Termination of Prosecution—
Informal Abandonment—Findings of Jury.*

In an action for malicious prosecution it appeared that warrants were issued, the plaintiff arrested, and put under bail to appear, on a charge of arson, and eleven witnesses for the prosecution summoned, but that before the day fixed for hearing the prosecutrix obtained information leading her to believe that the plaintiff was not guilty; that the magistrate, who had since died, gave some instructions or other to the chief constable, and that in the result no witnesses appeared, the proceedings were in some way stopped, and the prosecutrix or her mother paid the fees, and nothing more was heard of the case:—

Held, MEREDITH, J., dissenting, that enough had been shewn to justify the assumption that the prosecution had terminated favourably to the accused, before the action was brought.

THIS was a motion by the defendants to set aside the verdict for the plaintiff at the trial of this action, which took place before MEREDITH, C.J.C.P., at Brantford, on November 1st, 1904, and to dismiss the action or for a new trial.

The facts are stated in the judgments.

The motion was argued on December 15th, 1904, before BOYD, C., and MEREDITH and MAGEE, JJ.

C. J. Holman, K.C., for the defendants, referred to *Regina v. Hazen* (1893) 20 O.R. 633; *Basébé v. Matthews* (1867) L.R. 2 C.P. 687.

Heyd, K.C., for the plaintiff, referred to Newell's *Malicious Prosecution*, p. 327.

December 30. BOYD, C.:—Information laid by Hannah Beemer against Grace Beemer for unlawfully setting fire to a dwelling house on September 18th, 1902, and warrant of same date to arrest issued. Under this the plaintiff was arrested and brought before the police magistrate (since dead) and was let out on bail. That was on Saturday, and she says she was to return on Tuesday before the magistrate, but did not do so, and heard no more of the matter.

Mr. Tisdale, the high constable of Oxford, who arrested the plaintiff, says the case did not come on for trial, but he does not

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know why. He served eleven summonses for the Crown preparatory to the hearing. Being asked if the information was withdrawn, the question is objected to, and is not answered by him. His fees were paid by Mr. Ball, and the money apparently came from one of the defendants.

Mr. Zeats, chief constable at Woodstock, handed the police magistrate's warrant to Tisdale to be executed in the county; he says the bail was granted on Saturday, and the subpoenas or summonses to witnesses were set for the following Tuesday. He says the hearing did not come up on Tuesday, and he says he thinks he got instructions from the police magistrate—but being interrupted does not complete his answer—which had reference to withdrawal of the proceedings.

Mr. Ball, counsel for the defendants, says with reference to the payment of the fees by the defendant, Mrs. Beemer, "she simply came and paid the money to withdraw the proceedings;—surely that did not bind her for what took place previously."

When a nonsuit was moved because it was not proved that the prosecution had terminated, the Chief Justice said: "It is not a Court at all before the police magistrate. It is a preliminary enquiry. . . . Must I not take notice of the fact that there could not have been an enlargement of the eight days, and that the prosecution must have come to an end in that way? There was here no enlargement after the Tuesday." He rules that he thinks there is evidence it did not go on then, and concludes that he will reserve the question and not dispose of it then.

Mrs. Beemer in cross-examination says "she paid money to Mr. Ball for Tisdale, but as for settling it, she did not settle it because she had nothing to do with it." She is asked "How did the proceedings come to be withdrawn?" A. "I told you I went up a while after and Mr. Ball told me that I had better pay Mr. Tisdale's expenses, and I said I did not have anything to do with it, although if you think it is right, I will."

Upon re-examination she is asked by her own counsel "Why did you go and pay the costs and withdraw the proceedings?" A. "I cannot mind that."

The other defendant is asked "Why did you not go to court and prosecute?" A. "I did not have to go to court." "Well, how was it stopped?" A. "I do not know how it was stopped."

She is asked "Tell me what stopped the proceedings." A. "Mr. Zeats ought to know better than I do."

The Chief Justice treats it, in charging the jury, as proved that the mother, Mrs. Beemer, paid the costs of the prosecution and at Mr. Ball's request, and said also that "the prosecution did not go on apparently," and he puts the hypothesis that they were advised by Mr. Ball that it would not be wise to go on with the prosecution and to pay the costs at this stage in order that the prosecution might be put an end to. . . "The parties have not told us what became of the prosecution, and therefore you have to get your information, as well as you can, how that was. . . Was the old lady's payment probably to put an end to the prosecution instead of carrying it on?"

It is said that a prosecution may be regarded as terminated when it has been disposed of in such a manner that it cannot be revived, so that the prosecutor if he intends to proceed further must institute proceedings *de novo*: 19 Am. & Eng. Encyc. 2nd ed. p. 681. See *Pharis v. Lambert* (1853), 1 Sneed (Tenn.) 228.

In this case I think the evidence suffices to shew, and is eked out by the questions of counsel for the defendants, that the summons was not prosecuted by the defendants before the magistrate, but that the costs were paid and the matter was allowed to drop. No written termination of the proceedings is needed in such preliminary investigation, and the death of the magistrate precluded his being called. Enough was shewn here under the authority of *Reid v. Maybee* (1880), 31 C.P. 384, 392, to justify the jury and the Court in assuming that the prosecution had terminated favourably to the accused before the action was brought on January 9th, 1903. See Crim. Code, 55-56 Vict., c. 29, D., secs. 567, 580, and 586, and Stevens on Indictments, p. 73.

In other respects upon the points argued I agree with the conclusions of my brother Meredith that the case could not properly have been withdrawn from the jury and their finding should not be set aside. Finding that there is proof of a favourable termination of the prosecution, as alleged, I think that altogether the judgment should be affirmed with costs.

These costs, I think, should be on the lower scale and no set off.

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MEREDITH, J.—The learned trial Judge could not rightly have withdrawn from the jury the question whether the defendants really believed the plaintiff to have been guilty of the crime with which she was charged, the whole course of unfortunate antagonism and quarrelling between the parties alone left that to some extent an open question; and so the jury were very properly told that it was for them to find whether the charge was made in good faith, and that if they found that it was, then they must find for the defendants, for in that case there would be reasonable and probable cause.

There was also some evidence which could not be dealt with except by the jury from which it might be found that the elder defendant had joined with the younger in the prosecution, in not only the testimony of the witness Zeats and the admission of counsel for the defendants, but also in the antagonistic attitude and conduct of the parties, the one towards the other, the defendants together on the one side and the plaintiff and her husband on the other, as before adverted to.

But I am unable to find any reasonable evidence of the determination of the criminal prosecution in the plaintiff's favour; the evidence leaves that subject quite in the dark; the onus of proof of it was upon the plaintiff; she has not proved it and so cannot recover; there is no finding by Judge or jury upon the question.

I would allow the motion and dismiss the action on this ground with costs; and as bearing upon the question of costs, as well as of reasonable and probable cause, refer to the fact that the plaintiff did not deny that she had threatened to burn the buildings as testified to by the defendants.

MAGEE, J.—As to the termination of the prosecution the case stands thus: The charge of arson was made and information sworn to, warrants were issued, the accused parties arrested and put under bail to appear on a particular day for preliminary hearing, and eleven witnesses for the prosecution were summoned for the same day. Before that day arrived the prosecutrix obtained information shewing that the accused were absent on a visit to a relative at the time of the second fire which she blamed upon them, and which it is fair to assume operated on

her mind in laying the information for the first fire. On learning from this relative that the accused husband and wife could not have set the second fire she said, "Then it must have been George," who is another brother. Whether anything, or what, passed between her and the magistrate in consequence is not known, but the magistrate gave some instructions to the chief constable who thereupon telephoned to the high constable who had been serving witnesses, and the accused husband also had some conversation with the chief constable over the telephone. What these instructions and telephonic messages were is not shewn, the witnesses being interrupted, but the result, or at least the fact, is that neither accused, witnesses nor constable appear. Proceedings are in some way stopped. The prosecutrix or her mother pay the constable's fees. Nothing more is heard of the case, and all this is two years before the trial and over three months before the action, and the magistrate is not now living. It is a fair inference that the charge had been found to be not sustainable and had been withdrawn, and in effect dismissed by the magistrate, no evidence being offered. He was not required to keep or make any record or writing or return of the dismissal. With his death would end the means of proving that disposition, unless some one had been present, as perhaps was constable Zeats, to hear him. Proof thereby might be simpler or more cogent, but its absence does not prevent drawing an inference from the actual evidence.

Had the non-appearance of the accused not been in accordance with the magistrate's direction it would have been his duty to have issued process to compel their attendance and the recognizance should have been estreated and enforced in due course. It is not to be presumed that officials did not perform their duty. There was, I consider, sufficient evidence to submit to the jury. The testimony for the defendants in no wise weakens the case on this point, while the assertion by their counsel at the close of the plaintiff's case, that Lydia had paid the money to withdraw the prosecution, is not to be lost sight of, and she, when subsequently asked by him "Why did you go and pay the costs and withdraw the proceedings?" answers, "I cannot mind that." As to a discharge by an examining magistrate being sufficient termination to support action for malicious prosecution, see 19 Am. & Eng. Encyc. of Law,

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2nd ed., p. 682, and *Reid v. Maybee*, 31 C.P. 384, 392, and *Sinclair v. Haynes* (1858), 16 U.C.R. 247.

As to the defendant Lydia being connected with the prosecution, I agree that the evidence was sufficient to submit to the jury and that their verdict should not be disturbed on that score. It was attempted for the defence to prove that chief constable Zeats was in error and that it was not the mother but another sister who went with Hannah to the magistrate, but it is noticeable that no hint was given of this in the cross-examination of Mr. Zeats, and the other sister is not called. The evidence of the defendants is not very satisfactory as to the withdrawal and payment of fees. The jury do not seem to have placed confidence in their denials in the slander action and were manifestly impressed as little on this question.

On the question of reasonable and probable cause raised at the close of the evidence there was sufficient in the plaintiff's case to make out its absence. At the close of the defendants' case the learned Chief Justice replied to counsel who urged that this proof was wanting: "I cannot say that." He then desired to take the opinion of the jury as to some facts. He did not, as argued on the present application, fail to assume the responsibility of deciding what was reasonable and probable cause. He expressly informed the jury that if they found the fires and the threats proved that would shew such cause, and the plaintiff must fail, but if they did not, then the plaintiff would be entitled to a verdict if their other findings should warrant it. In effect he asked them to answer "Yes" or "No," "Reasonable cause" or "Not," to his questions. No objection was taken to the course adopted. The defendants did not and do not now complain of the questions themselves being unfair to them. The issue submitted was simple—the fires and the threats. The jury in their verdict expressly find the absence of reasonable and probable cause, shewing that they appreciated their instructions. I am not disposed to find fault with their decision. They had the witnesses before them, and the trial of this and the slander action together had at least the advantage of giving the jury a pretty thorough opportunity of forming an opinion as to the credibility of the parties.

In my view the motion should be dismissed with costs.

[DIVISIONAL COURT.]

REX V. SPEGELMAN.

D. C.

1905

Jan. 7.

*Gaming—Municipal By-law—Gambling in Private House—Conviction Quashed—
R.S.O. 1897, ch. 223, sec. 549 (4).*

A municipal by-law provided that no person should permit any game of chance or hazard with cards to be played for money, within any house, purporting to be founded upon sec. 549 (4) of the Municipal Act empowering municipalities to pass by-laws for suppressing gambling houses. On an information under this by-law, the evidence shewed that the defendant's friends used to come to visit him in his private house on Sundays, and there sometimes play poker for money, and that they did so on the occasion in question; but there was no evidence that the house was of a character of a "gambling house":—

Held, that the section is pointed at houses where gaming or gambling is practised, and the house kept for such purpose; and that the by-law was therefore *ultra vires*, and the conviction of the defendant under it must be quashed.

THIS was a motion by the defendant to quash his conviction by the police magistrate of the city of Toronto for allowing a game of chance to be played for money upon his premises, under the circumstances mentioned in the judgment.

The motion was argued on December 13th, 1904, before BOYD, C., MEREDITH, and MAGEE, JJ.

J. M. Godfrey, for the defendant, contended that the by-law was *ultra vires* as legislating against gambling, not against gambling houses, and that all such legislation against gambling was *ultra vires* of the Provincial Legislature, and referred to Consolidated Municipal Act, 3 Edw. VII., ch. 19, sec. 549, sub-sec. 4: *Regina v. Sanders* (1900), 20 C.L.T. 213; *Scott v. Pilliner*, [1904] 2 K.B. 855, 858.

J. S. Fullerton, K.C., for the corporation of the city of Toronto, pointed out that the law in question was in force before Confederation: 22 Vict., 1st sess., ch. 99, sec. 275, sub-sec. 8; and referred to *Re Harris and The Corporation of the City of Hamilton* (1879), 44 U.C.R. 641; *Regina v. Boardman* (1871), 30 U.C.R. 553; *Redgate v. Haynes* (1876), 1 Q.B.D. 89; *Biggar's Municipal Manual*, p. 633.

J. S. Cartwright, K.C., for the Crown.

Godfrey, in reply, referred to *Regina v. Shaw* (1891), 7 Man. 518; *Jenks v. Turpin* (1884), 13 Q.B.D. 505; *Attorney-*

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January 7. BOYD, C.:—The information is for that Spiegelman did “permit or allow a game of chance or hazard with dice, cards, or other devices to be played for money, liquor, or other thing within 139 Adelaide street West, in the city of Toronto,” contrary to the by-law in that behalf.

The evidence shews that the place in question is the private house of the defendant; that his friends come to visit him on Sundays, and sometimes play poker for money, and the occasion under investigation was one of these Sundays when this game of chance was played for money.

The by-law relied on provides “that no person shall keep or permit to be used in any house or room or other place for the purpose of gambling, any faro-bank, rouge et noir, roulette table, or other device for gambling, or permit or allow any game of chance or hazard with dice, cards, or other device to be played for money, liquor, or other thing within such house, room, or place.”

The conviction literally follows this language with all its alternatives, changed into conjunctives, and if the by-law is valid, the conviction would be deemed sufficient.

The by-law purports to be founded on a clause in the Municipal Act empowering the municipality to pass by-laws “for suppressing gambling houses, and for seizing and destroying faro-banks, rouge et noir, roulette tables, and other devices for gambling found therein.” R.S.O. 1897, ch. 223, sec. 549 (4).

The legislation is pointed at houses where gaming or gambling is practised, and the house is kept for such purpose. The inquiry in this case was not as to whether the place in question was a “gambling house,” and there was no evidence to induce that conclusion. One instance is proved, or perhaps two, in which cards for gain had been played at the house, but that falls far short of what would be required to attach to it the character of a “gambling house.”

The section is grouped in the Municipal Act with “disorderly houses,” under the general heading of “public morals,” and contemplates places which are to be regarded as nuisances to the

community. For it is old law that "all common gaming houses are nuisances in the eye of the law . . . not only because they are great temptations to idleness, but also because they are apt to draw together great numbers of disorderly persons, which cannot but be very inconvenient to the neighbourhood." Hawkins' Pleas of the Crown, 8th ed., book 1, ch. 32, sec. 6.

The element of frequency at least is essential to make out that any place is a gambling house, and isolated instances on Sundays when Jews come together in private houses to play cards, are not under the scope of this statute. It is not needful to consider whether it is in conflict with the criminal law of Canada—although the *ultra vires* question was broached on the argument—and therefore to consider whether there is a distinction between the "gambling houses" of the Provincial law, and the common gaming house of the Dominion Code, so that both may stand together because referring to different infractions of the law in its police and its criminal aspects.

For present purposes, it is enough to say that the by-law far transcends the terms of the enabling statute, and assumes to make illegal that which was not in contemplation of the Legislature, as expressed in the statute. Much that Kennedy, J., says in *Scott v. Pilliner*, [1904] 2 K.B. 855, may be applicable to the moral aspect of this case, but that should not lead us to penalize a man who has not violated public morals, in the use of his house according to the charge made, or the evidence adduced in support of it.

The conviction should be quashed because resting on an invalid by-law.

MAGEE, J., concurred.

MEREDITH, J.:—Spiegelman was neither convicted of nor charged with keeping a "common gaming house," nor with keeping a "gambling house"; if he had been, different questions would have arisen.

That which he really was convicted of, and charged with, was playing cards for money on one occasion in his own house with his friends; but that was no offence against any of the laws of this Province. If any of the by-laws in question

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purport to make it such, they are invalid. The power to pass by-laws "for suppressing gambling houses, and for seizing and destroying faro-banks, rouge et noir, roulette tables, and other devices for gambling found therein"—assuming it to have been validly conferred and still to exist—obviously cannot include a by-law making mere card playing for money, on one occasion, in a private residence, with the occupant's friends, an offence. It is somewhat surprising that it could be seriously contended that it did. A "gambling house" must be, at least, a house in which gambling is carried on as a business or occupation. None of the serious questions discussed need be considered. They do not arise in the facts of this case.

I would quash the conviction.

A. H. F. L.

[IN THE COURT OF APPEAL.]

IN RE NORTH RENFREW ELECTION.

C. A.

1904

Contempt of Court—Newspaper Editorial—Controverted Election.

Oct. 14.

Having regard to the principle that the summary remedy of committal for contempt because of comments on a matter *sub judice* should be granted only when it clearly appears that the course of justice has been or is likely to be restricted or impaired to the prejudice of the applicant, the Court refused a motion to commit the editor of a newspaper because of comments made in an editorial, pending the trial of an election petition in which the applicant, the member elect, was respondent, upon his election methods and expenditure, especially as after the argument of the motion the petition and a cross petition—both containing many charges of corrupt practices—had come on for trial and no evidence having been offered on either side had been dismissed, the applicant then resigning the seat.

AN application by the respondent in an election petition to commit for contempt of court the editor of a newspaper because of comments made in an editorial on the applicant's election methods and expenditure, was argued before MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ. A., on the 16th of May, 1904. The article complained of and the facts relating to its publication are set out in the judgments.

I. F. Hellmuth, K.C., for the applicant.

A. B. Aylesworth, K.C., for the respondent.

OCTOBER 14. OSLER, J.A.:—The disposition of this motion has been unavoidably delayed, but in the meantime the petition and cross-petition have been dismissed at a so-called trial. The Court cannot avoid taking notice of the manner in which this has been done, nor of the fact that notwithstanding the gravity of the charges alleged by each party against his opponent and his agents, no particulars of corrupt practices were delivered on either side nor any evidence offered in support of the charges. The only course left open to the trial Judges under such circumstances was to dismiss the petition and cross-petition, which having been done, if we may take notice of what has been publicly announced, the sitting member resigned.

The whole of the proceedings on both sides were so manifestly a sham and a user of the forms of the court for some purpose other than of the real trial of the charges, that con-

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tempt of court is not predicable of anything reflecting upon the parties to them. *In scenâ non in foro res agitur*, and whether the play is damned or applauded is no concern of a court of justice.

On this ground—but on this ground only—I would dismiss the motion, and so dismissing it, I would dismiss it with costs.

GARROW, J.A.:—An election petition contesting the seat of the applicant had been filed, the trial had not taken place, and the proceedings were pending, when the article in question was published.

The article is as follows:—

“A Celebrated Election Case.

The extraordinary, if not unprecedented, sum admitted to have been paid by Mr. Dunlop to secure his election for North Renfrew recalls what is perhaps the most celebrated election case to be found in the records of the Dominion Parliament or of the Ontario law courts. This was the petition to unseat the late Mr. John Walker for the city of London thirty years ago. The two candidates at the election had been fellow-members of the Conservative party and warm personal friends. It were bootless to inquire what caused the rift in the lute, but something moved Mr. Walker to run against Mr. Carling, and he was elected by a narrow majority. The election was contested, and Mr. Walker was unseated and disqualified. In view of the fact that Mr. Dunlop admits through his official agent an expenditure of over \$7,000, it is more than interesting to note some of the features of the London case.

The first point is that the agent of Mr. Walker admitted spending various sums paid openly to him by the respondent for legitimate purposes. The Judge who presided at the trial, the late Sir John Hagarty, summed those up at about \$2,100, adding: ‘It was not strongly pressed that such a sum would, under the circumstances, be extravagant, nor am I prepared to hold that it was.’ As the learned Judge was horrified to discover that the expenditure all told amounted to \$9,000, one may easily imagine what he would have thought of a ‘legitimate’ expenditure of \$7,000, if such a thing had come under his notice. Among the items were \$120 for livery-stable bills,

\$850 for printing and advertising, \$300 for clerks and messengers, and \$700 to ward committees for 'rent of rooms, refreshments, light, vehicles, driving about, canvassing, etc.'

The personal complicity of Mr. Walker in the illegitimate expenditure which cost him the seat, and eventually brought upon him the penalty of disqualification, was raised not merely during the trial, but by the presiding Judge in his analysis of the case. One of his business partners admitted paying out between \$5,000 and \$6,000 in sums varying from \$50 to \$1,500. Another \$2,000 was contributed by a member of a legal firm which did business for the respondent. It was argued strongly by the petitioner's counsel that Mr. Walker must either have known that all this money was being spent, or have kept himself intentionally ignorant of it. All records of the respondent's organization and campaign were destroyed or otherwise put out of the purview of the court, and this strengthened the suspicion against him. The presiding Judge had no hesitation in avoiding the election, but as to the personal charge he gave Mr. Walker the benefit of the doubt, due to the fact that his oath was directly against evidence entirely circumstantial. However, the Court of Common Pleas, on appeal, unanimously held that he must have had some knowledge of what was done in his behalf, and pronounced the penalty of disqualification accordingly.

What strikes one most forcibly in reading Chief Justice Hagarty's judgment is his naive expression of horror because the evidence disclosed 'an enormous amount of bribery and corruption.' The whole of the expenditure, including \$2,000 of which the legitimacy was not questioned, amounted to only \$9,000, and the net sum which brought about a state of 'wholesale corruption' was just about the sum which Mr. Dunlop's agent admits on oath to have gone for 'legitimate expenses.' It grieved the learned and amiable Chief Justice that 'a member of the legal profession should knowingly place in the hands of unscrupulous men a sum like \$6,000 to be used in debauching and corrupting a constituency.' He describes the inquiry as 'startling,' and speaks of the 'vast amount of mischief and wickedness resulting from extensive bribery.' If there are any 'unscrupulous' election workers in Mr. Dunlop's

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party organization it was certainly unwise, not to say dangerous, to place in their hands any considerable part of so suspiciously large a sum as \$7,000. Judging from analogy, the inquiry in North Renfrew may be even more 'startling' than the one that made London famous for a generation."

Before dealing further with the facts, it may be convenient to see what has been declared to be the law upon the subject, and in doing so I will make no attempt to review the numerous cases on the subject, but will confine myself to a reference to a few of the more recent, and, as I think, authoritative decisions.

Jessel, M.R., in delivering judgment in the case of *In re Clements* (1877), 46 L.J. Ch. 375, says (p. 383): "Therefore it seems to me that this jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched, and exercised, if I may say so, with the greatest reluctance and the greatest anxiety on the part of Judges to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject. I say that a Judge should be most careful to see that the cause cannot be fairly prosecuted to a hearing unless this extreme mode of dealing with persons brought before him on accusations of contempt should be adopted. I have myself had on many occasions to consider the jurisdiction, and I have always thought that necessary though it be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found. Probably that will be discovered after consideration to be the true measure of the exercise of the jurisdiction." This language is quoted and adopted by Cotton, L.J., in delivering judgment in the case of *Hunt v. Clarke* (1889), 58 L.J. Q.B. 490. And Lord Russell, C.J., in the more recent case of *The Queen v. Payne*, [1896] 1 Q.B. 577, on a similar application to commit for contempt, approves of the remarks of Cotton, L.J., in the case of *Hunt v. Clarke*, and says: "No doubt the power which the Court possesses in such cases is a salutary power, and it ought to be exercised in cases where there is real contempt, but only where there are serious grounds for its exercise. Every libel on a person about to be tried is not necessarily a contempt of Court;

but the applicant must shew that something has been published which either is clearly intended, or at least is calculated, to prejudice a trial which is pending. . . . We have been referred to certain cases in the Chancery Division of the High Court as authorities in support of the present application. I will not refer to these decisions further than to say that, in my opinion, in some instances, the Courts have gone rather too far." And in the same case Wright, J., says: "I agree with all that the Lord Chief Justice has said, and I only wish to add that, in my opinion, in order to justify an application to the Court the publication complained of must be calculated really to interfere with a fair trial, and, if this is not the case, the question does not arise whether the publication is so objectionable in its terms as to call for the interference of the Court. If the publication is found to be likely to interfere with a fair trial, a second question arises, whether, under the circumstances of the case, the jurisdiction which the Court in that case possesses ought to be exercised, not so much for punishment as for preventing similar conduct in the future."

And in the case in this Court of *Re Lincoln Election* (1878), 2 A.R. 353, on a similar application, Moss, C.J.A., says (p. 368): "While we accede to the contention of the petitioners that it is the duty of the Court to assert its summary jurisdiction in a proper case, we are of opinion that the extraordinary power of punishing summarily as for a contempt an act not committed in the face of the Court, ought, as a rule, only to be exercised where it appears that the intention was to obstruct or interfere with the due administration of justice, or where such a result would be the natural or necessary consequence of the conduct in question."

It will thus be seen that there is high authority for the proposition that such an application as this should only be granted where it clearly appears that the course of justice has been or is likely to be restricted or impaired to the prejudice of the applicant unless summary punishment is inflicted upon the offender. If the article is merely libellous or if it is even strictly a contempt of court, but not of such a nature as to impede the course of justice, then the applicant must resort to what other remedies, if any, the law gives him, and cannot

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successfully invoke the summary, and as it has been called arbitrary remedy now sought.

As to the facts, I have quoted the article in full. It is not even claimed by the applicant that there was an intention to interfere with the course of justice. The utmost that is urged is that the article is calculated to interfere with a fair trial.

Is the article then under all the circumstances one which, really and seriously, in the language of the learned Judges which I have quoted, is calculated to interfere with a fair trial of the petition against the applicant? In my opinion it clearly is not.

I am not sure that the petition itself is before us, but I will assume that it is the ordinary petition alleging corrupt practices. The trial will therefore take place before two Judges upon the *rota*, and no one will for a moment believe that their minds will be prejudiced or affected in the very slightest degree by the article or otherwise than by the evidence adduced upon the trial.

The only remaining room for prejudice must be that the witnesses may in some way be affected. But how? I confess that I have tried in vain to imagine in what possible way or mode the witnesses, either for or against the issues joined, can or will be affected. There is no attempt in the article to discuss in advance the evidence to be produced, nor any suggestion of what it will or will not prove; no suggestion that all the witnesses who can testify will not do so, or that they will not when called tell the truth and the whole truth, or that full effect will not be given by the Judges to the testimony when adduced.

The subject of the article, namely, the unusual amount, over \$7,000, which the applicant had expended in the election in legitimate expenses, was a matter of public and general interest, and so a legitimate subject of newspaper comment. It was in fact public property, inasmuch as the statute requires the publication of the particulars of such expenses.

The inquiry in the election petition would not necessarily involve any question about the amount or character of the expenditure for legitimate expenses. That inquiry would apply, as I assume, solely to illegitimate expenses and other corrupt acts and practices.

Primâ facie, therefore, comment however strong upon the amount of the legitimate expenses would not necessarily infringe upon the rule against comments upon matters which are *sub judice*.

The gravamen of the charge is, of course, the reference in the article to the notoriously corrupt London election. That was the case not of legitimate but of illegitimate and corrupt expenditure, and the comparison made by the article was therefore at least illogical, in addition to being, as in my opinion it was, unfair and unjust to Mr. Dunlop. But however unfair or unjust or even libellous it may be, I remain perfectly unconvinced that its publication can possibly affect a full, free, and fair trial of the pending petition. And being of this opinion, I think the present application fails, and should be dismissed, but, under the circumstances, without costs.

MOSS, C.J.O., MACLENNAN, and MACLAREN, JJ.A., concurred

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Negligence—Master and Servant—Defect in Machinery—Conflict of Opinion as to Type—Defective System of Inspection—Workmen's Compensation Act, sec. 3, sub-sec. 1, sec. 6, sub-sec. 1.

In an action brought against a railway company to recover damages because of the death of a fireman who was scalded by steam which escaped in consequence of the giving way of a water-pipe in an engine, evidence was given on behalf of the plaintiff that the type of engine in question was of dangerous construction and especially liable to accidents of the kind, but it was shewn on cross-examination of the plaintiff's witnesses that the use of engines of this type was well established and that they had many points in their favour:—

Held, that the principle adopted in actions of negligence against professional men should be applied, namely, that negligence cannot be found where the opinion evidence is in conflict and reputable skilled men have approved of the method called in question.

At common law a master is bound to provide proper appliances for the carrying on of his work, and to take reasonable care that appliances which if out of order will cause danger to his servant are in such a condition that the servant may use them without incurring unnecessary danger. These duties he may discharge either personally or by employing a competent person in his stead, and the purpose of sub-sec. 1 of sec. 3 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, as modified by sec. 6, sub-sec. 1, is to take from the master his common law immunity for the neglect of such a person.

Where therefore an accident occurred as the result of the giving way of a water pipe in an engine which had not long before been in the defendants' repair shop for the purpose of having the water pipes repaired, it was held that the inference might be drawn that there had been negligence on the part of the workman entrusted with the duty of making the repairs and either absence of inspection or negligent inspection, and that if an inference of either kind were drawn the defendants would be liable.

A nonsuit granted by MEREDITH, J., was therefore set aside and a new trial ordered.

APPEAL by the plaintiff from the judgment at the trial.

The action was brought by the plaintiff, as administratrix of the estate of her deceased husband Robert H. Schwoob, to recover damages for personal injuries which, as she alleged, were sustained by him owing to the negligence of the respondents, and resulted in his death, and it was founded on the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160.

The deceased was in the employment of the respondents as fireman on locomotive engine No. 480, which was of what is known as the "Atlantic" type, and was provided with arch flues or hot water pipes which passed through the fire-box and had their ends inserted into the hot water tank surrounding the fire-box.

On the 17th of November, 1903, while the engine was on its journey from Windsor to Niagara Falls, and at a point about seventy-five miles east of St. Thomas, one of these tubes drew out of the tank, with the result that the boiling water and steam from it escaped, and the deceased was so badly scalded that he died a few hours after.

The appellant's case as presented at the trial was, (1) that the use of arch flues or hot water pipes was improper, because, as it was attempted to be shewn, it was highly dangerous to use them owing to their being very liable to draw out; (2) that this danger was increased by an unsafe and improper method of keeping the pipes in place which was adopted and in use by the respondents; and (3) that the pipe which drew out when the deceased received his injuries was insecurely and negligently fastened into the side of the tank to which it was attached.

It was also alleged that respondents had not made proper provision for the inspection of these appliances, and it was contended that having regard to the liability of the hot water pipes to become displaced and to draw out, special care and vigilance should have been exercised to see that they were always in good and efficient repair and condition.

It appeared in evidence that the pipe which drew out when the deceased was injured had been put in in the respondents' workshop, to replace one that had become defective, but it was not shewn by whom this was done or under what circumstances the engine was sent to the workshop to be thus repaired.

There was evidence that in making this repair the pipe had not been properly secured, and the inference might be drawn that it was owing to this that the pipe drew out.

The action was tried at St. Thomas on the 31st of October, 1904, before MEREDITH, J., and a jury, and the learned Judge at the close of the plaintiff's case ruled that negligence for which the respondents were answerable had not been shewn.

The appeal was argued before a Divisional Court [MEREDITH, C.J., C.P., MACMAHON, and MAGEE, JJ.] on the 11th of January, 1905.

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T. W. Crothers, for the appellant. The nonsuit in this case was wrong, there being sufficient evidence to justify the submission of the case to the jury. The engine in question was of a dangerous type. Owing to its peculiar mode of construction an accident of the kind which occurred was to have been expected. The evidence shews that engines of this type require very careful handling and constant watching, and the particular engine in question had been out of repair several times. The mode of fastening the water-pipes in question was defective, and not only was the mode defective but there had been actual negligence in carrying out that mode. The case therefore comes within sub-sec. 1 of sec. 3, as modified by sub-sec. 1 of sec. 6, of the Workmen's Compensation for Injuries Act. The defendants are also liable because there was no proper system of inspection, and the evidence goes quite far enough to justify the inference being drawn that the accident occurred owing to the negligence of the foreman or other person in charge of the defendants' repair shop: *Markle v. Donaldson* (1904), 7 O.L.R. 376; affirmed in appeal (1904), 4 O.W.R. 377; *McArthur v. Dominion Cartridge Company* (1904), 21 Times L.R. 47.

E. C. Cattanach, for the respondents. The evidence shews that the engine is one of a type in use on several important railways and very highly thought of, and it is impossible to say that the defendants were negligent in adopting the type for use on their railway. There is nothing to justify a finding that the engine was improperly constructed, nor is there any evidence of negligence in effecting the repairs. It would be most unreasonable to draw any inference of negligence from the mere fact of the accident having happened. Such an accident might have resulted from one of several different causes, and the plaintiff has failed to show what the actual cause was. There is nothing to bring the case within the Workmen's Compensation for Injuries Act. If there was any negligence in fact in the effecting of the repairs in question it was the negligence of a fellow servant of the deceased.

Crothers, in reply.

MEREDITH, C.J. (at the close of the argument):—On all the points except the one arising on sec. 3, sub-sec. 1, and sec. 6, sub-sec. 1, of the Workmen's Compensation for Injuries Act, as to the condition of the pipe which drew out, we think there is no ground for disturbing the ruling of the learned trial Judge.

This is a case in which the principle of such cases as *Jackson v. Hyde* (1869), 28 U.C.R. 294, and *Fawcett v. Mothersell* (1864), 14 C.P. 104—physicians' cases—where there is opinion evidence upon both sides, and the fair result of that evidence is that if (as applied to physicians' cases) recognized practitioners have adopted the plan that has been adopted by the physician whose conduct is impugned, the case must be withdrawn from the jury, because it is impossible to find negligence where reputable, skilled men in the profession adopt the method which has been adopted as the proper one to be used in the particular case.

Now, there are two principles, that which I have referred to, and the other principle, that a man who buys a known article which is in use from the manufacturer is not responsible for the consequences of any defect in it which is not apparent to him or which ought not to be discovered by the exercise of reasonable care.

In this case there is evidence that this particular type of machine—when I speak of "type of machine" I mean with this appliance, pipes passing through the fire-box, I think it is called—is in use by important railway companies upon this continent, and it appears to be thought by them, at all events, an improvement, and is being gradually introduced more and more, I should judge, notwithstanding the observations upon the evidence which are directed to the contrary view.

It would be an extraordinary thing, knowing, as one does, how railway companies endeavour to get the best kind of appliances to meet the demands for quick and safe transit in the present day, that where railway companies adopt a type of locomotive which commends itself to important railway companies as a suitable and safe one, and which is adopted and used by them without any more danger than from another type, it should be open to a plaintiff who happens to be injured in the use of such a locomotive to recover from that railway company because somebody, who happens to be a journeyman

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mechanic or the head of some establishment connected with the manufacturing of engines, says that in his opinion better means might be adopted of constructing the particular engine. I think it would be a most unsafe thing if anything of that kind should be permitted, and I think it is not in accordance with the law of this Province.

The other question is one of very considerable difficulty, and one of very general importance, and we will have to reserve judgment upon it.

January 28th. The judgment of the Court upon the question reserved was now delivered by MEREDITH, C.J. (after stating the facts as above set out):—As we concurred in the ruling as to the first and second grounds of complaint and disposed of that branch of the case on the argument, it is unnecessary to refer to it now. As to the third ground, the ruling proceeded upon the view that the negligence charged was the negligence of a fellow servant of the deceased, and that for that negligence the respondents were not answerable either at common law or under the Act.

On the argument before us, counsel for the appellant relied upon sub-sec. 1 of sec. 3 and sub-sec. 1 of sec. 6 of the Workmen's Compensation for Injuries Act, in support of the third ground of complaint, his contention being that the person who made the repair in the respondents' workshop was a person entrusted by them with the duty of seeing that the condition of the engine in as far as the taking out of the defective pipe and replacing it by another were concerned was proper, and it was also contended that there was evidence to justify the inference being drawn by the jury either that the system in operation on the respondents' railway was defective in not providing for careful inspection at frequent intervals of the pipes which ran through the fire-box, or if such an inspection was provided for that those entrusted with the duty of making it were negligent in the performance of that duty; and that this negligence was the cause of the deceased being injured.

In endeavouring to ascertain what is the effect of sub-sec. 1 of sec. 3, as qualified by sub-sec. 1 of sec. 6, it is necessary to consider what is at common law the duty of the employer as to

the matters with which the sub-sections deal. What that duty is is thus stated by Lord Herschell in *Smith v. Baker*, [1891] A.C. 325, at p. 362: "It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk."

It is also clear that at common law the employer is not bound in person to execute the work in connection with his business, but he is bound, if he does not personally superintend and direct the work, to select proper and competent persons to do so, and to provide them with adequate materials and resources for the work, and that having done this he has done all that he is bound to do, and for the negligence of the persons so selected he is not answerable, *per* Lord Cairns, *Wilson v. Merry* (1868), L.R. 1 Sc. App. 326, at p. 332.

One of the duties flowing from this obligation of the employer is to take due and reasonable care that machinery which if out of order will cause danger to his employee is safe and in such a condition that the employee may use it properly without incurring unnecessary danger. What is due and reasonable care is one of degree in each case, and depends upon the nature of the machinery, its liability to get out of order, and the danger incurred by the employee if he is suffered to use it when not in a condition to be safely used: *Murphy v. Phillips* (1876), 24 W.R. 647, 35 L.T.N.S. 477.

The employer who omits to discharge this obligation to his employee either by performing it personally or by employing a competent person to do it is liable at common law to answer in damages to his employee (unless the employee himself knew of the defect) for any injury happening to him owing to a defect in the condition of the machinery which by reasonable examination from time to time might have been discovered.

The purpose of sub-sec. 1 of sec. 3 and sub-sec. 1 of sec. 6 was in my opinion to take from the employer this immunity from liability for the neglect of the person to whom he has entrusted the duty of providing and maintaining in proper condition the appliances for the work in which his employees

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are engaged, but it was not intended otherwise to affect the common law liability of the employer, and that it does not do so.

If therefore the respondents in this case did not provide for a proper examination from time to time of the locomotive upon which the deceased was working, and the defect in it which caused the injury to him would have been discovered had such an examination been had, they are in my opinion answerable for a breach of the duty which they owed to the deceased of taking reasonable care to provide proper appliances and to maintain them in a proper condition, and if, on the other hand, they did provide for such an examination, if the defect would have been discovered by a proper examination they are answerable for the negligence of the person or persons whom they entrusted with the performance of that duty.

The respondents are also, in my opinion, answerable for the negligence of any person whom they had entrusted with the duty of seeing that the locomotive was repaired so as to make it fit to be safely used, for such a person would be, I think, a person entrusted by them with the duty of seeing that the machinery was proper within the meaning of sub-sec. 1 of sec. 6: *Markle v. Donaldson*, 7 O.L.R. 376, affirmed in appeal but not yet reported.*

The evidence adduced at the trial as to the means adopted or in use by the respondents to ensure the proper discharge of the duty which they owe to the deceased was very meagre, but there was enough, in my opinion, to entitle the appellant to have her case passed upon by the jury.

There was, I think, evidence which if believed would support a finding by the jury of negligence in the discharge of the duty which the respondents owed to the deceased, and that the deceased came to his death owing to that negligence.

There was evidence of a defect in the condition of the locomotive which caused the drawing out of the pipe and the escape of the hot water and steam; there was evidence also from which the conclusion might be reached that by proper inspection of the locomotive the defect might and ought to

* See 8 O.L.R. 682.

have been discovered as well as the danger to which the engineer and fireman would be exposed in the use of the locomotive in its defective condition; and there was also evidence from which the inference might be drawn that the failure to discover and remedy the defect was due either to the omission of the respondents to provide for a proper examination being from time to time had of the locomotive, or if they had made provision for such an examination, to the negligence of the person entrusted by them with the duty of making the examination, and if all this had been found by the jury it is, I think, impossible to say that a verdict in favour of the appellant would not have been warranted.

Having come to this conclusion, it follows that there must be a new trial, and I refrain therefore from discussing the evidence in detail or from expressing any opinion as to the weight of it.

For these reasons I am of opinion that the judgment appealed from should be reversed and a new trial ordered, and that the costs of the appeal and of the last trial should be costs in the cause to the party who is ultimately successful, and upon the new trial it should not be open to the appellant to rely upon the first and second grounds of complaint, and that as to these her action should remain dismissed.

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MENDELS V. GIBSON.

Mortgage—Sale on Credit—Account of Proceeds—Removal of Building from Mortgaged Property—Subsequent Action on Covenant.

A mortgagee who without special power to that effect sells the mortgaged property on credit, is chargeable with the purchase price as if it had been received by him in cash.

The principle that a mortgagee cannot sue the mortgagor on his covenant unless he is in a position to reconvey the mortgaged property to him intact does not apply to the case where the mortgagee is in a position to restore the whole of the mortgaged land, but owing to the removal or destruction of a building on the mortgaged land the property is not in the condition in which it was when the mortgagee took possession, unless, *semble*, the building is of such a character that compensation in money, which the mortgagor is in such an event entitled to, would not be an adequate indemnity.

In re Thuresson (1902), 3 O.L.R. 271, distinguished.
Judgment of ANGLIN, J., reversed.

APPEAL by the plaintiff from the judgment at the trial.

The action was brought on a covenant by the respondent for the payment of \$700 and interest contained in a chattel mortgage from him to the appellant, bearing date the 20th of April, 1899.

The respondent set up in answer to the appellant's claim that the chattel mortgage was given as collateral security to a mortgage on a cheese factory and the land on which it stood which he had given to the appellant, and on which there remained due the \$700 secured by the chattel mortgage; that the appellant took possession of the property covered by both mortgages and sold it on the 7th of August, 1902, under the power of sale which the mortgages contained, to Alvin W. Mitchell, for \$750; that Mitchell subsequently sold the property for \$1,000; that the machinery contained in the factory was immediately removed by Mitchell or his grantee and that the factory was dismantled by Mitchell and "removed piecemeal several miles from the original location" and that the appellant by these dealings with the mortgaged property was "estopped from proceeding with an action on the covenant."

According to the evidence given at the trial, the respondent left Ontario and went to the North-West Territories immediately

after the chattel mortgage was given, without making any provision for payment of the mortgage money or for care of the property, which was left vacant, and he had remained in the North-West Territories ever since; the appellant in the following year took proceedings under his power of sale, and after advertisement of the intended sale, put up the property for sale at auction on the 21st of May, 1900, when the highest bid offered was \$150, and the property was withdrawn from sale; on the 7th of August, 1902, the appellant sold the property by private sale to Alvin W. Mitchell for \$750; on the same day an instrument in writing containing the terms of the agreement for sale was executed by both parties; according to its terms the purchase money was to be paid as follows: \$100 on the 1st of May, 1903, \$250 on the 1st of November, 1903, and the remaining \$400 on the 1st of November, 1904, all with interest from the date of the agreement; the agreement provided also for the conveyance of the property upon payment of the purchase money and interest, and that the appellant would suffer and permit the purchaser, his heirs and assigns, to occupy and enjoy the property until default in payment of the principal or interest at the agreed times.

The appellant did not himself occupy or use the property; the key of the factory was, however, under his control, and the purchaser, about the 1st of March, 1903, obtained it from the custodian of it by his direction. Mitchell never used or occupied the factory, but shortly after his purchase sold the property to Slavin and Magann, who proceeded at once to take the factory down and removed most of the materials of which it was composed to another site several miles distant, where they remained at the time of the trial. The boiler and engine were not removed, but the other property comprised in the chattel mortgage appeared to have been taken away.

The appellant was not a party or privy to what was done by Slavin and Magann, and did not become aware of it until after the removal had taken place, and nothing appeared in the evidence to warrant the conclusion that he afterwards acquiesced in what had been done. The most (as was held) that could be said was that he took no steps to compel the restoration of the property or to require the wrongdoer to answer in damages or otherwise for having removed it.

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Mitchell never completed his purchase or paid anything on account of either purchase money or interest, and the factory remained closed and unused until it was taken down.

The action was tried at Perth on the 24th of October, 1904, before ANGLIN, J., who gave judgment on the 7th of November, 1904. See 4 O.W.R. 336.

The learned Judge came to the conclusion that "the contract for sale to Mitchell and the giving to him of possession did not amount to an exercise of his power of sale by the plaintiff sufficient to extinguish the defendant's equity of redemption;" that the respondent was not entitled to credit for the purchase money on the footing of a completed sale to Mitchell; and that the respondent being therefore entitled to redeem and the appellant not being in a position to reconvey the security as it was when he took possession or when he gave possession to Mitchell, was not entitled to enforce the covenant sued on; and following *In re Thuresson* (1902), 3 O.L.R. 271, he made the following direction for entry of judgment:

"I direct judgment to be entered referring it to the Master at Perth to ascertain and state whether the plaintiff is in a position to reconvey the mortgaged property to the defendant substantially as it was when the plaintiff took possession; and in case the plaintiff shall within six weeks from this date prove to the satisfaction of the said Master that he is in a position to reconvey the said mortgaged property as aforesaid the said Master is to take an account of what is due to the plaintiff for principal, interest, and costs of the sale proceedings in the pleadings mentioned to be taxed, and to make all just allowances to the defendant in respect of any deterioration or depreciation of the mortgaged property attributable to the dealings with the mortgaged property of the plaintiff and the vendees or their servants or agents, and tax to the defendant his costs of action, and find what is due to the plaintiff on the footing of the account aforesaid (costs of reference and further directions in this event to be reserved). In default of plaintiff within one month from this date satisfying the said Master that he is in a position to reconvey the said mortgaged property as aforesaid, upon the Master so certifying, judgment is to go dismissing the action with costs to be paid by plaintiff to

defendant forthwith after taxation by the said Master including costs of reference."

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The appeal was argued before a Divisional Court [MEREDITH, C.J., C.P., MACMAHON, and MAGEE, JJ.] on the 12th of January, 1905.

G. H. Watson, K.C., for the appellant. The learned Judge was wrong in holding that the plaintiff was not in a position to reconvey the mortgaged property to the defendant in the condition in which it was when he took possession and could not sue on the covenant. In coming to this conclusion he has held that the principle of *In re Thuresson*, 3 O.L.R. 271, is applicable, but that case is distinguishable, for there part of the mortgaged land itself had been by the act of the mortgagee removed out of his control. In this case the mortgagee is in a position to restore to the mortgagor the mortgaged property as described in the mortgage, and it is immaterial that the condition of some of the buildings on that mortgaged property has been to some extent changed. At the most the mortgagor is entitled to an allowance for depreciation or for deterioration of the buildings: *Forster v. Ivey* (1900), 32 O.R. 175, (1901), 2 O.L.R. 480. The mortgagee is not, as is contended, bound by the sale to Mitchell. That sale was not carried out and the mortgagee is not liable for the amount of the purchase money agreed to be paid. *Bank of Upper Canada v. Wallace* (1869), 16 Gr. 280, shews that a sale which is not completed is to be disregarded. *Willes v. Levett* (1847), 1 DeG. & Sm. 392, is to the same effect. See also *Gowland v. Garbutt* (1867), 13 Gr. 578; *Burnham v. Galt* (1869), 16 Gr. 417; *Pegg v. Hobson* (1887), 14 O.R. 272.

T. D. Delamere, K.C., for the respondent. Clearly the principle of *In re Thuresson* is applicable here. There can be no distinction between destroying a building and conveying away part of the land. In either case the value of the property is impaired and the mortgagee cannot restore to the mortgagor the mortgaged property in the condition in which it was, and if this cannot be done the mortgagor cannot be sued on his covenant. At the least the mortgagee is bound to account on the basis of the sale to Mitchell. He chose to sell on credit

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and having done so is chargeable with the price as if he had received it in cash: *Patterson v. Tanner* (1892), 22 O.R. 364; *Beatty v. O'Connor* (1884), 5 O.R. 731. *Bank of Upper Canada v. Wallace* is distinguishable. In that case the agreement for sale was not completed, much less carried out.

Watson, in reply.

February 6. The judgment of the Court was delivered by MEREDITH, C.J. (after stating the facts as above set out):— I am unable to agree with the conclusion of the learned trial Judge.

The principle upon which *In re Thuresson* was decided is not in my opinion applicable to such a case as this.

That principle I understand to be "that every mortgagor has the right to have a conveyance of the mortgaged property upon payment of the money due on the mortgage and that every mortgagee is charged with the duty of making such conveyance upon such payment:" *Walker v. Jones* (1865), L.R. 1 P.C. 50, at pp. 61, 62, and that when the mortgagee has so dealt with the estate that the mortgagor cannot redeem it, he is not entitled to proceed on his personal securities: *Lockhart v. Hardy* (1846), 9 Beav. 349, at p. 357.

The principle has been applied where the mortgagee after foreclosure has sold the whole of the mortgaged estate: *Lockhart v. Hardy*, 9 Beav. 349; *Perry v. Barker* (1803), 8 Ves. 528; s.c. (1806), 13 Ves. 198; and where he has sold part only of the mortgaged estate: *Gowland v. Garbutt*, 13 Gr. 578; *In re Thuresson*, 3 O.L.R. 271, and where the mortgagee had sold the security retaining to himself the debt: *Walker v. Jones*, L.R. 1 P.C. 50.

The same principle has also been recognized or applied in *Schoole v. Sall* (1803), 1 Sch. & Lef. 176, where the title deeds had been handed by the mortgagee to his solicitor, who claimed a lien on them; *Stokoe v. Robson* (1814), 3 Ves. & Bea. 51, and s.c. (1815), 19 Ves. 385, where the title deeds had been lost by or stolen from the mortgagee; and *Shelmardine v. Harrop* (1821), 6 Madd. 39, a case of the same kind. In the first of these last three cases the mortgage money was ordered to be paid into the bank to remain until the title deeds were secured

and a reconveyance could be had; and in the other two of them the mortgagee was ordered to give an indemnity in respect of the lost deeds. In the last of them the order was made on consent, but the Vice-Chancellor (Sir John Leach) expressed a doubt whether it would not have been the best course for a Court of Equity in such cases to have made the usual decree for redemption and reconveyance, "leaving it to the mortgagor to bring an action of trover for his title deeds:" pp. 43-45.

Lord Redesdale, in *Schoole v. Sall*, referred to a case where the executor of a mortgagee who had died without any heir that could be discovered was restrained from proceeding at law to compel payment of the mortgage money, and the money was ordered into court until the executor should find the heir.

In *Kinnaird v. Trollope* (1888), 39 Ch. D. 636, the same principle was applied; and in *Dyson v. Morris* (1842), 1 Ha. 413, at p. 427, it was recognized and referred to by Vice-Chancellor Wigram.

In *Palmer v. Hendrie* (1859), 27 Beav. 349, and (1860), 28 Beav. 341, an injunction restraining the mortgagee from suing on the covenant was made perpetual at the hearing, and in delivering judgment the Master of the Rolls said: "If a man mortgages property and afterwards sells the equity of redemption to a third person, who then sells the property with the concurrence of the mortgagee, such mortgagee cannot, if he has allowed the purchaser of the equity of redemption to receive the purchase money, sue the original mortgagor for the amount of the money which he has thus allowed to be paid to the purchaser of the equity of redemption. That is one of the first principles of equity," and it was upon this ground that the defendants, who were executors of a mortgagee who had permitted the purchaser of the equity of redemption to receive purchase money paid by persons to whom he had with the concurrence of the mortgagee sold the mortgaged premises, to an amount greater than the mortgage money and interest, were restrained from proceeding at law against the mortgagor on his covenant for payment, though when the case was before the Master of the Rolls on the motion for an interlocutory injunction, he no doubt in granting it acted upon the principle which he had already given effect to in *Lockhart v. Hardy*, 9 Beav. 349.

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I have found no case in which the principle has been applied where the mortgagee is in a position to restore the whole of the mortgaged estate, but not in the condition in which it was when he took possession, even though the altered condition is due to his own act or the acts of those for whose dealings with the estate he is answerable to the mortgagor.

To give such a wide application to the principle would make it impossible for a mortgagee who had entered into possession of mortgaged property worth not more, it might be, than one-tenth of his debt, to sue upon his covenant, if he had either by acts or omissions caused or suffered the condition of the property to be altered, be it by pulling down a building or the improper cutting down of a tree, or the like, though the result had been to depreciate the value of the property but to a trifling extent.

In my opinion the principle does not extend to a mere alteration of the character or condition of the mortgaged estate, where the mortgagee is in a position to reconvey the whole of the land itself. I use this expression as meaning the land apart from that which is affixed to it, either by the operation of nature or the hand of man, such as a tree or a building; there is, as I view it, no good reason why he should not be entitled to recover the mortgage money after deducting from it what may be sufficient to compensate the mortgagor for the injury done to the mortgaged property by the wrongful act or default.

This was the view of the then Chancellor (Spragge) in *Munsen v. Hauss* (1875), 22 Gr. 279.

In that case the mortgagee had obtained a final order of foreclosure and after it had been obtained had mortgaged the estate; he had also before the final order entered into possession; the property was in a very dilapidated condition, and it was "a property of a very different character from that which came into his possession;" the land was there still, but a brick building was absolutely gone, and the other building very much out of repair: p. 282.

Referring to this condition of things, the learned Chancellor said (p. 282): "If that order (*i.e.* the final order) had never been obtained, I do not suppose that what has been done or neglected to be done by him, or both, would debar him from calling for

payment of his mortgage debt. He would certainly have to account as mortgagee in possession, but it could not be contended, I apprehend, that his dealings with the property had so altered its character that he could not in any proper sense restore the pledge, and as a consequence could not call for his mortgage money."

The injunction which the plaintiff sought was refused, but he was allowed to have an inquiry as to what, if anything, was due upon the mortgage which it was said by the Chancellor under the general orders would embrace all the dealings of the defendant with the mortgaged premises.

The report of the argument shews that the question I am dealing with was presented squarely for decision, the contention of plaintiff's counsel being that the defendant had used the buildings upon the property, which were the chief value of the premises, in such a manner as to have materially lessened the value of the estate; that the buildings "were literally gone, having been destroyed and allowed to fall into decay," and the contention of the defendant's counsel being that a mortgagee is disabled from suing only when he sells the mortgaged property or part of it, and not by any dealings of his with the buildings.

I am unable to see any sound reason for preventing the mortgagee from suing where the impaired condition of the mortgaged estate is due to his own acts, and allowing him to sue when that condition is due not to his acts but to his neglect to perform the duties which rested upon him as a mortgagee in possession. The existence of such a distinction is not suggested in *Munsen v. Hauss*, and the condition of the mortgaged premises in that case appears to have been due in part at least to the acts of the mortgagee.

It is unnecessary to consider whether a case may not arise in which, though the act of the mortgagee has been only the unlawful destruction of a building on the mortgaged land, he may nevertheless be precluded from suing on the covenant. It may be that where the building is of such a character that compensation in money would not be an adequate indemnity to the mortgagor for the injury done by its destruction, the principle of the cases to which I have referred may be applicable. I express no opinion on the point, for it is sufficient to

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say that for such an injury as was done to the mortgaged premises in this case, beyond question full compensation may be given by charging the mortgagee with the loss occasioned thereby to the mortgagor.

Nor is it necessary, in the view I take, to consider whether on the facts of this case, had no sale under the power taken place, the appellant would have been answerable for the wrongful act of Slavin and Magann in pulling down the factory building and removing the materials of which it was composed from the mortgaged lands, though my present impression is that the appellant is not answerable for these acts and is answerable if at all for the consequences of them only to the extent of any loss which may have been sustained by the mortgagor owing to the appellant not having taken steps to recover damages for the wrongful acts of Slavin and Magann or to compel them to restore the factory to its former condition.

I am of opinion, however, that the appellant is bound to account for the whole of the purchase price which was to have been paid by Mitchell. The appellant was not entitled, according to the terms of the powers, to sell on credit, but a sale made by a mortgagee on credit, if a real sale, is, according to the decided cases, a valid exercise of the power, if the mortgagee stands ready to account to the mortgagor for the price as so much money received by him in cash: *Thurlow v. Mackeson* (1868), L.R. 4 Q.B. 97, and cases there cited. See also *Kennedy v. De Trafford*, [1896] 1 Ch. 762, [1897] A.C. 180; *Beatty v. O'Connor*, 5 O.R. 731.

It is not, I think, open to the appellant to contend that the sale was an invalid one, and having been made for a price less in amount than was owing upon his mortgage he must be taken to have received the whole of the agreed purchase money or at least to have taken upon himself the risk of the failure of the purchaser to pay.

The case is, I think, distinguishable from *Bank of Upper Canada v. Wallace*, 16 Gr. 280. The power of sale in that case, I apprehend, authorized a sale on credit, and as by the terms of the power the mortgagees were to account only for what they received, it followed as a matter of course when it was ascertained that the purchase had not been completed

owing to the purchaser's default in paying a part of the purchase money, that the mortgagees were not chargeable with the whole purchase money.

If it had been that the power did not authorize a sale on credit, the controversy would have taken a very different shape from that which according to the report of the case it appears to have taken, viz., a contest only as to whether the purchase had been completed by a conveyance of the mortgaged property to the purchaser.

If, however, the power of sale was one not authorizing a sale on credit, it may well be that the sale was treated as one for cash, and as the mortgagees were chargeable only with what they received they were not bound to account for that part of the purchase money which remained unpaid.

The case referred to by Mr. Watson, *Willes v. Levett*, 1 DeG. & Sm. 392, is also, I think, distinguishable. In that case the mortgagee in the proper exercise of his power of sale had sold the mortgaged property to a purchaser for a price greater than the amount owing on his mortgage, but the time had not arrived for the completion of the purchase and the deposit of twenty per cent. of the purchase money only had been paid when the mortgagor sought to restrain further proceedings on a judgment which had been recovered by the mortgagee on the mortgagor's covenant for payment of the mortgage money.

An injunction which had been granted was dissolved on the coming in of the answer of the mortgagee, not merely, as I understand the case, because the purchase had not yet been completed but also because the mortgagor had filed a bill against the mortgagee and the purchaser impeaching the validity of the sale. The latter ground alone would appear to me to have fully warranted what was done, and I am unable to see on the other ground, if it stood alone, any reason for interference with the mortgagee in enforcing the judgment. All that the mortgagee had done was authorized by the power, and he was in a position on payment of the mortgage debt to reconvey the mortgaged estate to the mortgagor subject only to the contract of sale which he had in the exercise of the power entered into, and by which the mortgagor as well as the

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mortgagee himself was bound, and that in my opinion was all that he was bound to do.

The appellant is not, I think, chargeable with rents and profits for the period which elapsed after the respondent left the Province to the time of sale or for any part of that period.

He did not, as I have said, occupy the premises and is therefore not chargeable with an occupation rent; he received no rents and profits, and is not in my opinion chargeable for rents and profits which he might have received but for his wilful neglect or default. He was not bound to take possession and did not, I think, do so, at all events until he made the agreement with Mitchell. The key of the premises was in the possession of Lane, with whom it had been left by the respondent, and all that the appellant did was to send the auctioneer to the factory, when the sale was about to take place, to make an inventory of the chattels which were in it; the fact that Lane by the direction of the appellant gave the auctioneer the key to enable him to enter the factory for that purpose, or the fact that Lane was asked by the appellant to look after the property for him, or both of these facts combined, did not constitute a taking possession by the appellant so as to charge him with liability for the rents and profits which he might have received from the property, if indeed he could have rented it which is upon the evidence quite problematical.

Upon the whole I am of opinion that the judgment appealed from should be reversed, and in lieu of it judgment should be entered for the appellant for the mortgage money and interest (including the costs of exercising the power of sale, which may be taxed if the respondent so desires) less the amount of Mitchell's purchase money (\$750), treating it as a sum received on the 7th of August, 1902.

A reference will be unnecessary. The account may be taken by the Registrar.

The respondent must pay the costs of the action and of the appeal.

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[IN THE COURT OF APPEAL.]

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Jan. 23.

Limitation of Actions—Title by Possession—Registry Act—Notice—Mortgage—Avoidance of Prior Unregistered Deed—Relation Back to Date of Deed.

In 1891 the defendant wife being desirous of conveying to the other defendant in contemplation of her then intended marriage with him an interest in certain land owned by her, conveyed the land in fee simple to one S., who then conveyed to her and her intended husband in fee simple as tenants in common. S. duly registered the deed to himself, but fraudulently omitted to register his deed to the defendants, who then were and continued to be down to the time of the bringing of the action in actual possession of the land. S., after previously mortgaging the land to other persons, mortgaged it in 1895 to the plaintiffs, who registered their mortgage in good faith, the previous mortgage having been paid off. The fraud was not discovered till 1902, and in 1903 the plaintiffs brought this action to enforce their mortgage:—

Held, that the avoidance by virtue of the Registry Act of the prior unregistered deed to the defendants related back to the time of its execution; that from the time of the execution of the deed by the wife to S. the legal title was in him and that the statute then began to run against him; that the mortgage by him in 1895 to the plaintiffs did not give a new starting point to the statute as against the defendants, and therefore that the action was barred.

Judgment of Boyd, C., reversed.

Cameron v. Walker (1890), 19 O.R. 212, must, in view of the decision to the contrary of the Court of Appeal in *Thornton v. France*, [1897] 2 Q.B. 143, be regarded as no longer of authority.

Stephen v. Simpson (1869), 15 Gr. 594, specially referred to.

APPEAL by the defendants from the judgment at the trial.

On the 19th of June, 1891, the defendant Rachel Trenouth, then Rachel Maxfield, was the owner in fee simple in possession of 100 acres of land in the township of Cavan, and on that day being about to marry her co-defendant, desired to convey to him an undivided one-half share thereof, so that they might become tenants in common in fee. She therefore requested one George Sootheran, a conveyancer, to prepare the necessary instruments for that purpose, which he undertook to do.

The instruments which he prepared, which were duly executed in duplicate, were a conveyance from the lady to himself, Sootheran, and a reconveyance to the two defendants as tenants in common in fee.

The deeds were left with Sootheran for registration and safe keeping, and on the 29th of September afterwards he duly registered the conveyance to himself, but fraudulently omitted

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to register the reconveyance, and endorsed upon one of the parts a certificate of registration to which he forged the signature of the registrar.

Afterwards, on one or more occasions, Sootheran, without the knowledge of the defendants, fraudulently borrowed money for his own use, by mortgage of the land thus appearing to stand in his name in the registry office; and on the 30th of August, 1895, he applied to Mr. Seth S. Smith, a solicitor, for another loan wherewith to pay off the mortgage or mortgages which he had previously made. Mr. Smith, acting for the plaintiffs, agreed to advance the money, \$2,000, out of funds of the plaintiffs in his hands, upon receiving a certificate of the sufficiency of the security. For this purpose Sootheran forged a certificate purporting to be signed by the assessor of the township expressing that the land was worth \$4,000, and that the defendants were in possession thereof under a lease for seven years of which only three years had expired. Upon the faith of this certificate the loan was completed upon a mortgage of the defendants' lands, dated the 30th of August, 1895, executed by Sootheran to the plaintiffs, and this was duly registered on the following day.

Some time in the year 1902 the defendants learned accidentally of the registration against their land of the mortgage or mortgages thus made by Sootheran, and began to make enquiries, upon hearing of which Sootheran absconded.

The present action was commenced on the 12th of May, 1903, against the defendants who had been in continuous possession and occupation of the land from and after the 19th of June, 1890, and was for possession and sale of the land, in default of payment of the mortgage made to the plaintiffs by Sootheran, under the circumstances above related.

Two defences were set up to the action; first, notice of the fraud which had been committed by Sootheran, or such absence of enquiry as was equivalent to notice; and secondly, the Real Property Limitation Act.

The action was tried at Cobourg, on the 16th of November, 1903, before BOYD, C., who held against the defendants on both grounds of defence, and granted a judgment for redemption and sale, and for immediate possession.

The appeal was argued before OSLER, MACLENNAN, and MACLAREN, JJ.A., on the 19th of September, 1904.

G. H. Watson, K.C., and R. Ruddy, for the appellants. It is not contended that there was express notice to the plaintiffs of the true position of the title, but the appellants are within the doctrine of *Ross v. Hunter* (1882), 7 S.C.R. 289, there having been negligence on the part of the plaintiffs' solicitor in omitting to make enquiries as to possession. He was not entitled to rely on Sootheran's statements and the plaintiffs must be dealt with as if enquiry had been made in which event the fraud would have been discovered, and the mortgage in question would not have been taken. Apart from this the Statute of Limitations is a bar. The plaintiffs can have no higher right than Sootheran, and the defendants were in possession adverse to him before the mortgage was given. The statute therefore had begun to run in favour of the defendants before the making of the mortgage, and they have acquired title by their possession for more than ten years before the bringing of the action: *Canada Permanent Loan and Savings Co. v. McKay* (1881), 32 C.P. 51. *Cameron v. Walker* (1890), 19 O.R. 212, has been referred to in the Court below, and while that case is in favour of the view contended for by the plaintiffs it is in direct conflict with the later decision of the Court of Appeal in England in *Thornton v. France*, [1897] 2 Q.B. 143, which holds in express terms that the making of a mortgage by the holder of the legal estate does not give a new starting point to the statute as against persons then in adverse possession. In *Pugh v. Heath* (1882), 7 App. Cas. 235, in which it was decided that the order of foreclosure in question gave a new starting point, possession had not been taken until after the making of the mortgage. And see *Henderson v. Henderson* (1896), 23 A.R. 577; *Ludbrook v. Ludbrook*, [1901] 2 K.B. 96; *Eyre v. Walsh* (1860), 10 Ir. C.L. 346. The plaintiffs attempt to rely on Sootheran's deed as giving them title and yet at the same time to repudiate it in so far as it has the effect of placing the defendants in adverse possession to Sootheran, but this they are not entitled to do. They must either accept it or reject it: *Attorney-General v. Niagara Falls International Bridge Co.* (1873), 20 Gr. 492; *Sydney and Louisburg Coal and R.W. Co.*

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v. *Sword* (1892), 21 S.C.R. 152; *Marsh v. Webb* (1892), 19 A.R. 564, (1893), 22 S.C.R. 437; *Building and Loan Association v. McKenzie* (1897), 24 A.R. 599, (1898), 28 S.C.R. 407; *Ferguson v. Ferguson* (1869), 16 Gr. 309.

H. J. Scott, K.C., for the respondents. There was no negligence in the taking of the mortgage. Sootheran was a man in good standing, and all the usual precautions were taken by the plaintiffs' solicitor. It is admitted that there was no direct notice, and the plaintiffs cannot be charged with implied notice on the ground of negligence. Possession is not notice and the plaintiffs are therefore entitled to rely upon the Registry Act: *Sherboneau v. Jeffs* (1869), 15 Gr. 574; *Roe v. Braden* (1877), 24 Gr. 589. Nor is the Statute of Limitations, R.S.O. 1897, ch. 133, a defence. *Cameron v. Walker* is directly in point and in the plaintiffs' favour, though no doubt *Thornton v. France* is in conflict with it, and it is for the Court to decide which decision should be followed. Even assuming, however, that *Cameron v. Walker* is not followed the plaintiffs are entitled to recover. Sootheran, it is obvious, never had a right—which necessarily means a valid legal right—of action, and the statute never began to run as against him. The plaintiffs' right of action did not arise until either the making, or the registration, or the time for payment, of the mortgage, and if any one of these three periods is adopted as the starting point the action is in time. There is no inconsistency in the position taken by the plaintiffs. The unregistered deed from Sootheran to the defendants is void as against the plaintiffs, and they are entitled to rely upon the registered deed from the defendants to Sootheran. The argument of the appellants is in effect that because of the statutory avoidance in 1895 of the deed of Sootheran to the defendants by the registration of the mortgage from Sootheran to the plaintiffs the plaintiffs' right of action is thrown back to 1891, that is, to a period long prior to the time when they had any interest in the land.

Watson, in reply.

January 23. OSLER, J.A.:—In *Thornton v. France*, [1897] 2 Q.B. 143, it was held that the section of the Imperial

Real Property Limitation Act which corresponds with sec. 22 of our Act, R.S.O. 1897, ch. 133, does not confer a new right of entry on a mortgagee when at the date of the mortgage a person is in possession in whose favour the statute has already begun to run against the mortgagor: see also *Ludbrook v. Ludbrook*, [1901] 2 K.B. 96; *Archibald v. Lawlor* (1902), 35 Nov. Sco. 48. So far, therefore, as *Cameron v. Walker*, 19 O.R. 212, decides to the contrary of this it must be taken to be overruled, in accordance with the rule laid down for our guidance by the Judicial Committee in *Trimble v. Hill* (1879), 5 App. Cas. 342. It may be that cases will arise in which we should not consider ourselves bound to follow that rule, but the language of the Acts being the same and the question being one relating to real property the present case would seem to be one for its application if the circumstances call for it, as I think they do.

Substantially the question is, when the right of entry of the plaintiffs or of the person through whom they claim, namely, Sootheran, is to be taken to have arisen. If the statute ought to be taken to have been running in the defendants' favour before August, 1895, the date of Sootheran's mortgage to the plaintiffs, *Thornton v. France* shews that the mortgage did not interrupt it, and the defendants would have acquired a title by possession before the commencement of the action.

The circumstances in which the question arises are somewhat novel, and from one aspect of the case there is a difficulty in seeing how or against whom the statute was set running before the plaintiffs' mortgage. The defendants put in and proved the deed of June, 1891, from Sootheran to themselves, and, therefore, it is said that from thence until August, 1895, they were then in possession under that deed, and their possession was attributable to it and to it only. No one was in existence whose right of entry was affected by their possession. Sootheran's conveyance though unregistered was good as between the parties, though being unregistered it became fraudulent and void as against the plaintiffs when the latter registered their mortgage by virtue of sec. 87 of the Registry Act.

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On the other hand it is to be observed that the Registry Act only deals with and protects the registered title. It is only for the purpose of supporting that title and giving full effect to the Act that possession is held not to be notice of a prior unregistered deed under which it may be held: *Roe v. Braden* 24 Gr. 589; *Grey v. Ball* (1876), 23 Gr. 390; *Sherboneau v. Jeffs*, 15 Gr. 574, and subject to this the subsequent purchaser or mortgagee may be adversely affected by it as *Thornton v. France* shews. For the purpose of supporting their registered title, the plaintiffs are obliged to rely upon the Act, but for which the defendants' paper title would have been perfectly good as against them, and the question is whether having invoked the Act in order to destroy the defendants' deed they can set up the deed for any purpose, *e.g.*, for the purpose of giving a character to the possession which the defendants had enjoyed up to the date of their mortgage. Pushed to its extreme but legitimate length the plaintiffs' argument seems to lead to the somewhat surprising conclusion that if the defendants' possession between 1891 and 1895 is to be disregarded because between those dates it was not adverse to Sootheran or opposed to any right of entry he can be supposed to have had, then no length of possession even for twenty or thirty years or more would have been of any avail to the defendants under similar circumstances, who might be cut out by the subsequent deed of their vendor at any distance of time subsequent to the prior but unregistered deed. I think that we may safely deny this to be the law without fear of going counter to the policy of the Registry Act, because, while possession does not affect the subsequent purchaser or mortgagee with notice of the prior unregistered deed, he must still take the risk that by means of it some one may be acquiring a title of a different nature.

In *Stephen v. Simpson* (1869), 15 Gr. 594, the question arose between the heirs of the devisee under an unregistered will and the mortgagee of the heir-at-law of the testator. The case is in some respects the converse of the present case but the attempt was to give a character to the possession of the devisee by shewing that it had been under the will. It was held that the will being avoided by the Registry Act was void for all purposes, Draper, C.J., saying: "The unregistered will

must be adjudged fraudulent and void (against the mortgagee) and not merely as I understand the law from the time he acquired his interest, but *ab initio*."

If Sootheran had never reconveyed to the defendants, his legal right of entry under their deed to him, though no doubt defeasible by their equity to a reconveyance, would also in time be barred by the operation of the Statute of Limitations upon their continued possession adverse to the legal title he had acquired under their deed.

If the deed which he, in fact, made is now avoided by the plaintiffs for the purpose of supporting their registered title, and is to be treated as void *ab initio*, the defendants' possession must also be treated as having been adverse to Sootheran from the commencement, and the plaintiffs having avoided the deed for one purpose cannot set it up for another in order to give a character to such possession which in the absence of the deed would not attach to it.

The case is not without difficulty, but, upon the whole, I am of opinion that the defendants had acquired a good title under the Statute of Limitations before the commencement of the action, and that the appeal should be allowed.

MACLENNAN, J.A.:—I think the judgment was quite right on the first ground of defence, and that the only question is upon the application of the Statute of Limitations.

The ground of the learned Chancellor's decision is that the action was not barred, but was brought in time, because the defendants' title was good, and no action could have been brought against them until after the registration of the plaintiffs' mortgage, which made the unregistered reconveyance to the defendants fraudulent and void against the plaintiffs, an act which occurred within ten years.

The question is a novel one, and no direct authority has been cited on the point. I have, however, formed the opinion that it ought to be decided in favour of the defendants.

It depends upon two sections, namely, secs. 4 and 22, of the Limitations Act. Section 4 provides that no person shall bring an action to recover any land but within ten years next after the time at which the right to bring such action first

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accrued to some person through whom he claims; or if such right did not accrue to any person through whom he claims then within ten years next after the time at which the right to bring such action first accrued to the person bringing the same.

Section 22 provides that any person entitled to a mortgage of land may bring an action to recover such land at any time within ten years next after the last payment of any part of the principal money or interest secured by such mortgage although more than ten years have elapsed since the time at which the right to bring such action first accrued. The argument for the plaintiffs founded upon sec. 22 is set at rest by the decision in *Thornton v. France*, of the Court of Appeal in England, [1897] 2 Q.B. 143. The head note of that case is that the Real Property Limitation Act, 1837, does not confer a new right of entry on the mortgagee where at the date of the mortgage a person is in possession adversely to the mortgagor, and the Statute of Limitations has already begun to run in his favour against the mortgagor. That is precisely this case. When this mortgage was made the statute was running in favour of the defendants against the whole world.

The question then is as to the effect of sec. 4. It is argued that no action accrued to Sootheran, through whom the plaintiffs' claim, for he had no title. He had conveyed to the defendants, and so the defendants cannot rely on the first member of that section. And it is said that neither can the defendants rely on the second member of the section because the right to bring the action first accrued to the plaintiffs when they registered their mortgage.

But I think these arguments overlook the operation of the Registry Act. What that does is to make fraudulent and void the unregistered deed. It is made of no effect, as if it had never been made; as against the subsequent registered deed it is put out of the way, and cannot be put in evidence. Now if the reconveyance had never been made, it could not be contended for a moment that sec. 4 could not be invoked by the defendants.

In order to make any title at all the plaintiffs must rely on Sootheran's deed, and that is what they do in their statement of claim. They claim under him, and when the defendants set

up the reconveyance the plaintiffs are entitled to say, and do say, it is void. It may be true, and is true in fact, that Sootheran had no title after the reconveyance, yet it is now different *in law*, and by virtue of the statute he must as between the plaintiffs and defendants be regarded as having had a title which he could and did convey to the plaintiffs, so that they can and do and must claim under him, and so are within the first member of sec. 4.

In other words by virtue of the Registry Act Sootheran's title under which the plaintiffs claim relates back to the date of his deed, and is now part of the title on which the plaintiffs do and must rely.

I think the appeal should be allowed, and that the action should be dismissed.

MACLAREN, J.A.:—I am of the same opinion,

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Nov. 25.

Intoxicating Liquors—Searching for Liquor—Absence of Warrant—Private Dwelling House—County Constable—Notice of Action—Bond fides—Leave and License.

Defendant, a county constable, appointed by a police magistrate, searched the plaintiff's dwelling house for liquor without a warrant and without any special authority.

In an action for trespass the trial Judge held that the defendant was acting in the discharge of his duty, and there being no evidence of malice, that he was entitled to notice of action, and withdrew the case from the jury and directed a nonsuit:—

Held, that the question as to whether the defendant was acting *bond fide* in the discharge of his duty as a constable in searching a private house, as being a house of public entertainment, for liquor was a question for the jury: and that leave and license, which was argued on the appeal but not pleaded, should also, if pleaded, be submitted to the jury, and the judgment dismissing the action was set aside and a new trial ordered with liberty to the defendant to amend by adding a plea of leave and license.

Judgment of the county court of Hastings reversed.

THIS was an appeal from a judgment of the county court of the county of Hastings.

The action was for damages for trespass in searching plaintiff's dwelling-house for liquor without a warrant, and was tried on the 14th day of June, 1904, before His Honour Judge Lazier and a jury.

At the conclusion of the evidence the learned Judge withdrew the case from the jury and directed a nonsuit to be entered, holding that the defendant was a constable acting in the discharge of his duty in making the search, and there being no evidence of malice as provided for in R.S.O. 1897, ch. 88, sec. 1 (1) he was entitled to notice of action which had not been given.

From this judgment the plaintiff appealed to a Divisional Court, and the appeal was argued on the 30th September, 1904, before MEREDITH, C.J., C.P., MACMAHON and TEETZEL, JJ.

E. Guss Porter, for the appeal. The action is for trespass. The information laid was against a *public* house and the defendant was prosecuting, and to procure evidence to support such prosecution made the search complained of. He acted unreasonably in searching the plaintiff's *private* dwelling-house

without a warrant, and when his authority was demanded untruthfully stated he had the authority of the license inspector, the county crown attorney and the Attorney-General. When warned by the plaintiff that he had no right to search he threatened the plaintiff with a fine of \$100.00 if he was obstructed. He was not acting in his capacity as a constable and what he did was not done *bonâ fide*. There was a conflict of testimony and the case should have been left to the jury. His conduct was not authorized by sec. 130 of ch. 245, R.S.O., 1897, and was in direct violation of sec. 131 of that Act.

J. H. Moss, contra. There was no trespass here. Consent was given by the plaintiff to make the search, and it makes no difference how it was obtained. The defendant had received information that liquor was secreted in Donald Bell's cellar, and he really believed the defendant's house was that of Donald Bell, and made the search believing he had authority so to do: *Kelly v. Barton* (1895), 26 O.R. 608, at p. 622; *ib.* 22 A.R. 522. There was no damage.

Porter, in reply, referred to *Cottrell v. Hueston* (1857), 7 C.P. 277; *Neil v. McMillan* (1866), 25 U.C.R. 485; *Sinden v. Brown* (1890), 17 A.R. 173.

November 25. W. MACMAHON, J.:—Appeal from the judgment of the Senior Judge of the county of Hastings in an action to recover damages for an alleged trespass to the lands and searching the dwelling-house of the plaintiff in the township of Rawdon on the 14th day of April last, who at the conclusion of the trial withdrew the case from the jury and directed that judgment should be entered for the defendant, dismissing the action with costs.

The defendant was on the 12th of April, 1904, appointed a constable for the county of Hastings for the period of thirty days, by John J. B. Flint, Esq., police magistrate of the city of Belleville, before whom he on the same day took the oath of office, which was filed with the clerk of the peace for the county of Hastings, and a notification of the appointment was also on the same day mailed by Mr. Flint to the Lieutenant-Governor.

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When the defendant applied to Mr. Flint to be appointed a

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constable he said his object was to prosecute those accused of violations of the Liquor License Act.

The plaintiff is a resident of Central Ontario Junction (Bellevue post office), and had been such for twenty years, for fifteen of which he had been in the employment of the Canadian Pacific and Central Ontario Railways as freight agent, and at the time of the trespass complained of, was postmaster at Bellevue, and was not engaged in any other business.

On the 14th of April defendant went to the plaintiff's private residence, which is across the street from the post office, and according to plaintiff's evidence, the defendant stated that Mr. Faulkner, the license inspector, had appointed him to make searches, and he was there to search for people violating the law, and that he intended searching the cellar under plaintiff's house for liquor which he supposed was stored there for the purpose of sale. He also told the plaintiff he was a constable for the county, and anyone preventing him making the search was liable to a fine of \$100. The plaintiff procured a lantern, which he gave the defendant, but stated that when doing so he told him he had no right to search the premises. Defendant made a thorough search of the cellar but found no liquor therein; and plaintiff said he had never sold liquor or kept any for sale.

When plaintiff left the service of the railway companies, he and his son carried on a general store in partnership at Bellevue, and on the death of his son, two years prior to the trial of this action, the plaintiff succeeded his son as postmaster of the Bellevue post office, which was carried on in part of the store. The plaintiff on his son's death sold out the store and business to Donald Bell, a nephew, but continued the post office in part of Donald Bell's store. The plaintiff's dwelling-house was as already stated, on the opposite side of the street from the post office, and Donald Bell lived with him.

A man named Wellman, who kept a hotel in a building rented from the plaintiff, was for some time prior to and at the time defendant made the search, without a license (I think by reason of the township of Rawdon having passed a local option by-law), and it had been reported to the defendant shortly before his appointment as constable that a quantity of

beer in cases had been received by Wellman, and was stored in Bell's cellar, and he on the day he searched the plaintiff's house, but prior thereto, had searched Wellman's premises without discovering any liquor. The store occupied by Donald Bell adjoins Wellman's hotel, and is also owned by the plaintiff, and the cellar of the hotel is divided from that of the store by a stone wall. After making the search at Wellman's, the defendant saw Donald Bell in the latter's shop, and a conversation took place between them, and the defendant said to Donald that he thought the beer must be in the plaintiff's cellar, and that Donald (who lived with the plaintiff) said, "you can go over" (meaning to the plaintiff's private house) "and look through if you want to." Donald said that what he told defendant was, "you can go through if you wish, as far as I am concerned."

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Under the Liquor License Act, R.S.O. ch. 245, sec. 130 (1): "Any officer, policeman, constable, or inspector may, for the purpose of preventing or detecting the violation of any of the provisions of this Act which it is his duty to enforce, at any time enter into any and every part of any inn, tavern, or other house or place of public entertainment, shop, warehouse or other place wherein refreshments or liquors are sold, or reputed to be sold, whether under license or not, and may make searches in every part thereof, and of the premises connected therewith, as he may think necessary for the purpose aforesaid."

In *Rex v. Cretelli* (1904), 3 O.W.R. 176, where the defendant was convicted for an offence under sec. 50 of the Liquor License Act in permitting intoxicating liquors to be consumed on his premises, and the evidence shewed that the defendant's house was a private boarding-house or lodging-house in which from 20 to 40 workmen lived, and drinking by strangers on the premises had occurred on one occasion. It was held by a Divisional Court that the house was not a place of public entertainment, though if it had been shewn that what had happened, namely, drinking by strangers on the premises, occurred twice or thrice, it might be deemed to be so. An order was made quashing the conviction.

The defendant had known the plaintiff for many years, and said he knew it was against the law to search a private house,

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and had he known it was the plaintiff's house, he would not have searched it without a warrant, and that he never had any reason to apply for a warrant. He knew it was the plaintiff's private house when he entered the door, for the plaintiff told him it was his house, and said he had no right to make a search, notwithstanding which, he according to the evidence of the plaintiff and his housekeeper, Margaret McDermaid, persisted in searching the cellar.

There was no evidence whatever that the premises occupied by the plaintiff was a house of public entertainment or that liquor had at any time been sold or kept upon the premises. The beer for which the defendant was searching was stored in the cellar under Donald Bell's shop and was found there by the defendant after he had searched the plaintiff's private house.

The learned trial Judge directed a nonsuit to be entered because the defendant was a constable acting in the discharge of his duty in making the search, and there being no evidence of malice he came within the protection provided by R.S.O. 1897, ch. 88, sec. 1 (1), and was entitled to a notice of action without which the plaintiff could not succeed.

The question as to whether the defendant was acting *bona fide* in the discharge of his duty as a constable in searching a private house, as being a house of public entertainment, for liquor was a question for the jury, and in view of the defendant's admission that he knew he had no right to search a private house, it is difficult to see how he can have made the search in discharge of his powers as a constable; indeed the real defence is that the search was made by the leave of the plaintiff. Honest belief is always a question for the jury: *McKay v. Cummings* (1884), 6 O.R. 400.

During the argument counsel for the defendant urged that the procuring by the plaintiff of a lantern and giving it to the defendant when entering the cellar was conclusive of leave having been given by the plaintiff to make the search. But the plaintiff says he told the defendant when handing him the lantern that he had no right to search the cellar, and Margaret McDermaid, the plaintiff's housekeeper, said that while the defendant was descending the cellar stairs she heard the plaintiff tell him he had no right to search the cellar, and

the defendant himself admits that, as the plaintiff handed him the lantern, he told him he had no right to search the house,

There is no plea of leave and license on the record, and without an amendment that question cannot properly be, as if the amendment had been made, it must have been, submitted to the jury.

I think that the judgment dismissing the action must be set aside and a new trial ordered, with liberty to the defendant to amend by adding a plea of leave and license.

The costs of the former trial and of the appeal to be costs in the cause to the plaintiff in any event.

MEREDITH, C.J., and TEETZEL, J., concurred.

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[IN THE COURT OF APPEAL.]

WILSON

v.

THE LINCOLN PAPER MILLS MANUFACTURING CO., LIMITED.

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1899

July 3.

1900

May 15.

Negligence—Master and Servant—Injury to servant—Cause of accident—Evidence—Factories Act, R.S.O. 1897, ch. 256, sec. 20.

An employee in a paper mill received injuries from a defective and unguarded elevator which subsequently caused his death.

At the trial of an action by the administrator of his estate against the owners of the mill, it was shewn that the approach to the elevator shaft was unguarded, and that the elevator was defectively constructed in that it had no safety catch, or other safeguard, as required by the Factories Act, R.S.O., 1897, ch. 256 sec. 20 (c) (d):—

Held, that the defendant company was liable, notwithstanding that there was no direct evidence of how the deceased was injured.

Kervin v. The Canadian Coloured Cotton Mills Co. (1896), 28 O.R. 73 distinguished.

Groves v. Wimborne, [1898] 2 Q.B. 402 followed.

THIS was an action by John Wilson as administrator of the estate of John Wilson, jr., against the defendant company, who were the employers of the said John Wilson, jr., who had been injured by an elevator in the defendants' mill, resulting in his death.

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The action was tried at St. Catharines on the 13th of March, 1899, before MACMAHON, J., and a jury.

G. Lynch Staunton and *J. H. Ingersoll*, for the plaintiff.
Osler, Q.C., for the defendants.

The facts appear in the judgment.

July 3. MACMAHON, J.:—At the conclusion of the trial it was agreed that judgment should be postponed until the judgment of the Supreme Court had been delivered in the case of *Kervin v. The Canada Coloured Cotton Mills Co.* (1896), reported in 28 O.R. 73, and (1898) 25 A.R. 36. The judgment of the Supreme Court was delivered on the 30th of May last.

The questions submitted to the jury, with their answers thereto, are as follows:—

1. Q. Can you say on the evidence what caused Wilson's death; if so, state the cause? A. We find that the deceased John Wilson came to his death through a defective elevator.

2. Q. Was there any negligence on the part of the company through the want of a guard or otherwise causing the injury resulting in death? A. Yes, on account of not having a guard and not sufficient light.

3. Q. Was Wilson guilty of any act which contributed to his death? If so, what was such act? A. No.

4. Q. What pecuniary loss has the plaintiff sustained by the death of his son? A. We place the pecuniary loss to the plaintiff at \$700.

The present case differs very materially from *Kervin v. The Canadian Coloured Cotton Mills Co.*, 28 O.R. 73. In that case the evidence was as consistent with Kervin having lost his life in endeavouring to cross the wheels on the two planks—which he had been forbidden to use, and which had once been removed by the superintendent of the defendants' mill, but were there at the time of the accident—as by falling on the wheels by reason of their not being guarded by a fence. It was therefore a mere matter of conjecture as to how Kervin met his death.

Under the Factories Act, R.S.O. 1897, ch. 256, sec. 20:—

“(c) The openings of every hoist-way hatch-way, elevator,

... shall be at each floor provided with and protected by good and sufficient trap-doors or self-closing hatches, and safety catches, or by such other safeguards as the inspector directs, and such trap-doors shall be kept closed at all times except when in actual use by persons authorized by the employer to use the same.

“(d) All elevator cabs or cars, whether used for freight or passengers, shall be provided with some suitable mechanical device to be approved by the inspector, whereby the cab or car will be securely held in the event of accident to the shipper, rope or hoisting machinery, or from any similar cause.”

The defendants' mill consists of a basement, the next storey being the engine-room (in the evidence frequently called the “beater-room”), and the storey above, the bag-room.

The deceased had been for two years assistant machine-tender in the rooms where the dynamos were running, and his duties were to oil the machinery, to take the paper from the end of the machine as it came therefrom, and, if it was bag paper, to put it on a truck and take it up to the bag-room by means of the elevator. This he would do at intervals of an hour and a half. About half past four in the morning (he being that week on the night shift) the deceased left the machine-room with two rolls of paper on the truck, saying to Samuel Moffatt, the machine-tender, that he was going to take them up stairs and would be back in a minute.

The elevator shaft is close to the wall of the machine room, and is unprotected on three sides, and is thirty-five or forty feet from the place where deceased started with the truck.

Had the floor of the elevator been on a level with the floor of the machine-room, Wilson would have wheeled the truck with the paper on it to the elevator and ascended with it to the bag-room. The accident happened immediately after Wilson had left where Moffatt, the machine-tender, was stationed, as Samuel Clark, the fireman, was at the fire-hole on the basement floor, and, hearing a noise as if something had fallen, ran to the machine-room, ten or twelve steps distant, and asked Moffatt where Wilson was, and on Moffatt replying that he had just gone up to the bag-room with two rolls, Clark said he did not think so, as either the hoist fell or he, Wilson, had fallen down

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the shaft, for he heard some kind of a racket, and he did not see him around, and that the two rolls were there—on the machine-room floor. Both Moffatt and Clark ran out and found the truck with the paper on it within four or five feet of the elevator shaft, and looking down the shaft saw the elevator ascending with Wilson lying thereon face downwards, his head and shoulders being over the edge of the elevator. The elevator was stopped before it reached the under side of the machine-room floor, and Wilson taken off, when it was found that his jaw-bone was broken in two places, his skull fractured, and there was an incised wound under the chin. He was then unconscious and died the same day.

Whether Wilson, finding that the elevator was not on the machine-room floor, and going to the elevator shaft to see if it was in the basement or up in the bag-room, and from the shaft being unguarded fell to the basement, where the elevator was, and so received the injuries which caused his death: or, finding that the elevator was in the storey above, went up to bring it down, is not known.

The evidence was that the elevator was in the habit of working up, through the belt getting on the tight pulley, and, working on that pulley, would go up by itself to such a height that it would jump, and the hoist rope slipping, and, being slack, would coil up on the floor of the elevator. If Wilson went up to the bag-room while the elevator was in that condition and he stepped on it, it is said his weight would start the elevator, and, the rope being slack, the elevator would fall as far as the slack rope would let it go; but that it would not reach the bottom of the basement, as the sudden jerk caused the eye-bolt to break, and that the elevator then commenced to reascend. However, within two or three minutes after he left the machine-room with the truck to go up to the bag-room the elevator with Wilson lying thereon injured as described is seen ascending from the basement of the mill. And it matters not whether he was injured by falling through the elevator shaft or by getting on the elevator while the rope was slack, and so went down with the elevator and received the injuries during its descent, for in either case the defendant company is liable. In the one case for *leaving the shaft unguarded*, and

in the other because the elevator had no device to hold the car in the event of an accident to the ropes or hoisting machinery, the evidence being that with proper safety catches, even if the rope had broken, the elevator would not have fallen more than a foot.

As pointed out by the Court of Appeal in *Groves v. Wimborne*, [1898] 2 Q.B. 402 (which I had not read before charging the jury), the Factories' Act was passed in favour of workers employed in factories and workshops, to compel employers to perform certain statutory duties for their protection and benefit, and on proof of a breach of this statutory duty imposed on the defendant and injuries resulting to the plaintiff therefrom, *prima facie* the plaintiff has a good cause of action. A like opinion was expressed in 1890 by Mr. Justice Ferguson in *Finlay v. Miscampbell*, 20 O.R. 29, at p. 39.

Groves v. Wimborne was decided after the decision of the Supreme Court in *The Montreal Rolling Mills Co. v. Corcoran* (1896), 26 S.C.R. 595, where the Court held that the provisions of the Quebec Factories' Act were intended to operate only as police regulations, and that the statutable duties thereby imposed do not affect the civil responsibility of employers toward their employees, as provided by the Civil Code.

There may be provisions in the Quebec Factories Act not embodied in the Ontario Act, but the *Groves* case has settled the law as it applies to the Factories' Act in England and Ontario.

There was ample evidence to support the findings that the defendants were guilty of negligence and to connect such negligence with the accident resulting in Wilson's death. And if there was contributory negligence on the part of the deceased the onus of proving it rested, in the first place, on the defendants: *Wakelin v. The London and South Western R. W. Co.*, (1886) 12 App. Cas. 41, at pp. 47-48, *per* Lord Watson.

There must be judgment for the plaintiff for the sum of \$700, with interest from the 13th March last, together with costs of suit.

The defendants appealed to the Court of Appeal, and the appeal was argued on the 21st March, 1900, before MACLENNAN, MOSS and LISTER, JJ.A.

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H. H. Collier, for the appellants.

J. H. Ingersoll, for respondents.

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On 15th May, 1900, judgment was given, dismissing the appeal with costs.

G. A. B.

MacMahon, J.

[BRITTON, J.]

1904

GILBERT V. IRELAND.

Dec. 8.

Costs—In Action to Establish a Will—Unsuccessful Defence of Fraud and Undue Influence.

In an action to establish a will, in which the defendants set up an unsuccessful defence of fraud and undue influence:—

Held, considering the mode in which the testator had executed the will, and the conduct of the beneficiaries under it, that all parties should have their costs out of the estate.

THIS was an action to establish a will and for a judgment directing probate to issue, which was tried at the Assizes held at Milton on 7th November, 1904, before BRITTON, J., and a jury.

J. B. Clark, K.C., and *F. A. Kerns*, for the plaintiffs.

G. H. Watson, K.C., and *Kirwan Martin*, for the defendants.

At the trial the defendants alleged fraud and undue influence, but failed to prove either, and judgment was given in favour of the plaintiffs, but the trial Judge reserved the question of costs, and subsequently gave judgment as follows.

December 8. BRITTON, J.:—I have given a good deal of consideration in this case to the question of costs.

Should persons who, in opposing probate of a will, set up fraud and undue influence and fail, ever get costs out of the estate, and if so, in what cases?

In *Goodacre v. Smith* (1867), L. R. 1 P. & D. 359, Sir J. P. Wilde reserved the question of costs, and afterward gave to the defendants their costs out of the estate, saying: "The Court cannot regard the method of will making adopted by the plaintiffs, and their conduct in keeping the relatives away from the testatrix, as satisfactory. Under all the circumstances, I think the defendants' costs ought to be paid out of the estate."

In *Orton v. Smith* (1873), L. R. 3 P. & D. 23: "The Court allowed costs out of the estate to the unsuccessful opponent of a will although he had pleaded undue influence and fraud, being of opinion that the mode in which the testator had executed the will and the conduct of the persons beneficially interested under it had reasonably excited doubt and suspicion, and justified those pleas."

The facts in this latter case are quite applicable to the present case, and I think I should go further than to merely relieve the defendants of the plaintiffs' costs.

I have read the following cases bearing upon the point: *Tippett v. Tippett* (1865), L. R. 1 P. & D. 54; *Smith v. Smith* (1866), L. R. 1 P. & D. 239; *Macauley v. Kemp* (1880), 27 Gr. 442; *Aylwin v. Aylwin*, [1902] P. 203; *McFadyen v. McFadyen* (1896), 27 O. R. 598; *Wilson v. Wilson* (1875), 22 Gr. 39.

Upon the peculiar facts and circumstances which came out upon the trial, and considering fairly the conduct of the beneficiary, I think the case is well within the rule under which the Court allows costs out of the estate, and I so order as to all the parties.

G. A. B.

Britton, J.

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[IN CHAMBERS.]

1905

CANADIAN RADIATOR CO. v. CUTHBERTSON.

Jan. 14.

Writ of Summons—Service out of Jurisdiction—Cause of Action, where Arising—Contract—Conditional Appearance.

On an application for the allowance of service of a writ of summons out of Ontario in an action on a contract, the plaintiff alleged and the defendant denied that the contract was to be performed within Ontario, within the meaning of Con. Rule 1246:—

Held, that this issue was not to be determined in a summary way on affidavits, but the defendant's proper course was to enter a conditional appearance under Con. Rule 173, and then raise the question of the want of jurisdiction in his pleading.

THIS was an appeal by the defendants from an order of the Master in Chambers dismissing a motion to set aside an order for issue of a writ of summons for service out of the jurisdiction, the writ issued pursuant to the order, and the service upon the defendant in Manitoba, under the circumstances indicated in the judgment.

The appeal was argued before BOYD, C., in Chambers, on January 13th, 1905.

C. J. Holman, K.C., for the defendant, referred to Con. Rule 173; *Howland v. Insurance Company of North America* (1895), 16 P.R. 514; *Lopez v. Chavarri*, [1901] W.N. 115; *Atkinson v. Plimpton* (1903), 6 O.L.R. 556, 570; *Fry and Co. v. Raggio* (1891), 40 W.R. 120.

C. A. Moss, for the plaintiff, cited *Charles Duval and Co. v. Gans*, [1904] 2 K.B. 685.

Holman, in reply, cited *Bell and Co. v. Antwerp, London and Brazil Line*, [1891] 1 Q.B. 108.

January 14. BOYD, C.:—The contract is not in writing and the writ has been issued in the Province of Ontario, and served in Manitoba on affidavits setting forth that the contract was to be performed by payment in this Province. This satisfies what is required by Con. Rule 1246,* and although the defendants by

* Con. Rule 1246, amends Con. Rule 162 (e), by providing that service out of Ontario of a writ or notice of a writ may be allowed by the Court or Judge wherever:—

(e) The action is founded on a judgment or on a breach within Ontario of a contract wherever made which is to be performed within Ontario or on a tort committed therein.

affidavit dispute and say that the contract was made and to be performed in Manitoba, yet that issue cannot or should not be determined in a summary way on affidavits. Yet should the defendants be protected in this contention, and have the benefit of it in a proper way and at a proper time. The former common law practice was in cases of doubt to require the plaintiff to give an undertaking to prove at the trial a cause of action within the jurisdiction, or else to suffer nonsuit, but the Ontario rules providing for conditional appearance (Con. Rule 173) favour the former equitable practice which was to enter such appearance and raise the want of jurisdiction by plea or demurrer. That is better also in that it severs the issue as to jurisdiction from the other defences so that in a case where there will be great expense in the trial of all the merits, this preliminary matter as to jurisdiction may be ordered to be tried separately if the parties are so disposed. That is the proper course to take on this appeal—not to try the disputed question of jurisdiction on affidavits, but to permit the defendant to enter a conditional appearance, and thereafter raise his contention on the record. Costs in the cause to the plaintiff, and appeal dismissed.

A. H. F. L.

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[BOYD, C.]

1905

IN RE CORNELL.

Jan. 12.

Settled Estates—Trust For Sale—Limitation “by Way of Succession”—R.S.O. 1897, ch. 71, secs. 2 (1) 33.

Under the scheme of a will, land was to be rented by the executors until the testator's youngest son came of age, unless with the sanction of certain adult children, the executors should sooner sell the property at good advantage:—

Held, that this was substantially a trust for sale of the land, but not till the youngest child was of age, unless sooner sold as directed, and was a limitation “by way of succession” within the Settled Estates Act, R.S.O. 1897, ch. 71, sec. 2 (1), and a sale was directed under that Act.

THIS was a petition under the Settled Estates Act, R.S.O. 1897, ch. 71, for leave to sell land included in the will of Elizabeth Ann Cornell, who died on November 15th, 1900.

The will, so far as material here, provided as follows: “I give, devise, and bequeath all my real and personal estate of which I may die possessed in the manner following, that is to say . . . To my executors, I want them to collect all rent and moneys coming to me . . . all money over and above expenses to be paid in to my son Elmo for the benefit of my son Glendon . . . until such time until Glendon can support himself either by trade or education, then said money . . . to be equally divided between the three children . . . until Glendon becomes of age, unless my executors with the sanction of my daughter Maud and son Elmo, sells the properties at good advantage . . . when Glendon is 21, property to be valued, and Elmo to have first chance to buy brick house, and Glendon to have \$800 invested for him, the balance belonging to me in properties and moneys to be equally divided between the three children . . . I give and grant my executors power and authority to sell and dispose of real estate for purpose of distribution thereof as mentioned in this my last will.”

The motion was argued on January 11th, 1905, before BOYD, C., in Weekly Court.

J. E. Jones, for the petitioner.

F. W. Harcourt, for the infant defendants.

W. J. Boland, for the estate of Bedell.

C. J. Holman, K.C., for the prospective purchaser.

The following were referred to: R.S.O. 1897, ch. 71, sec. 26; *In re Currie and Watson's Trusts* (1904), 7 O.L.R. 701; *Re Hooper* (1896), 28 O.R. 179.

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January 12. BOYD, C.:—The scheme of this will (which is home-made) appears to be this, that the land is to be rented by the executors until the youngest son comes of age, unless, with the sanction of the adult children named, the executors sooner sell the property "at good advantage." When the youngest child is 21 the property is then to be valued and certain options to purchase given to the children, and lastly power of sale is given to the executors, for the purpose of distribution as mentioned in the will. That is substantially a trust for sale of the land, but not till the youngest child is of age, unless it is sooner sold with the sanction of the two adult children named.

A devise of land on trust to permit occupation during life or widowhood of the testator's wife, and then to sell has been held to be a limitation "by way of succession" within the Settled Estates Act: *Carlyon v. Truscott* (1875), L.R. 20 Eq. 348. See R.S.O. 1897, ch. 71, sec. 2 (1). And in a case where the trustees were to receive the rents during the minority of any of the children, and during that time the children were not to be entitled to the beneficial interest in possession, but on the youngest child attaining 21, they were to get possession, it was held by Malins, V.-C., *In re Sheppard's Settled Estate*, (1869), L.R. 8 Eq. 571, that this was limited by way of succession, within the beneficial scope of the statute. With some hesitation I think this case may be regarded as falling within the scope of the Settled Estates Act. The purchaser is a willing one and will be protected by secs. 39 and 40 of the Act. See *Micklethwait v. Micklethwait* (1858), 4 C.B.N.S. 790, at p. 858, defining "settled estate," and *Re Hooper* (1896), 28 O.R. 179; *In re Laing's Trusts* (1866), L.R. 1 Eq. 416.

A good case is made for realizing money from the property by sale of the whole in view of the increased taxation and the disrepair of the house, and the inability to make sufficient outlay from the funds of the estate.

The terms of the will contemplate a sale for the purpose of

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distribution in the future; even an accelerated sale is provided for with the sanction of the two children adults. One of them is dead, and it is impossible to carry out that provision: *Montefiore v. Browne* (1858), 7 H.L.C. 241; but I think the Court may under the Act exercise its power of directing a sale forthwith under the supervision of the Master. The purchase money may be paid into court, after satisfying the mortgage upon the trusts of the will: *In re Morgan's Settled Estate* (1870), L.R. 9 Eq. 587. See sec. 33 of the Act, R.S.O. 1897 ch. 71. Costs out of estate.

A.H.F.L.

[IDINGTON, J.]

BRENNAN V. FINLEY.

1905

Feb. 8.

Limitation of Actions—Landlord and Tenant—Payment of Taxes by Tenant.

The lessee of a house at a yearly rental without taxes agreed with the lessor after he had been in possession of the house for some time to pay the municipal taxes and water rates chargeable in respect of the house on the understanding that the amount would be deducted from the rent payable by him. He remained in possession of the house for more than eleven years prior to the time of the bringing of the action having paid the taxes and water rates each year to the municipal authorities, but not having made any payments to the lessor:—

In an action for foreclosure by a mortgagee of the lessor under a mortgage made subsequent to the lease, it was held that, even assuming the agreement had been intended to relate to future years (which was doubtful), the payments of taxes and water rates did not operate to prevent the bar of the statute.

Finch v. Gilray (1889), 16 A.R. 484, applied.

ACTION of foreclosure tried before IDINGTON, J., without a jury, at the Ottawa Assizes, on the 12th of January, 1905.

Geo. F. Henderson, and *A. W. Green*, for the plaintiff.

Glyn Osler, and *F. M. Burbidge*, for the defendant Joyce.

The following authorities were referred to: *Davis v. McKinnon* (1871), 31 U.C.R. 564; *Finch v. Gilray* (1889), 16 A.R. 484; *Workman v. Robb* (1882), 7 A.R. 389; *Coffin v. North American Land Company* (1891), 21 O.R. 86; *McIntyre v. Thompson* (1901), 1 O.L.R. 163; *McConaghy v. Denmark* (1880), 4 S.C.R. 609; *Sherren v. Pearson* (1887), 14 S.C.R. 581; *Henderson v. Perry* (1847), 3 U.C.R. 252; *Cameron v. Walker* (1890), 19 O.R. 212, at p. 222; *Thornton v. France*, [1897] 2 Q.B. 143; *Ludbrook v. Ludbrook*, [1901] 2 Q.B. 96; *Jones v. Cleaveland* (1858), 16 U.C.R. 9; *Doe Quinsey v. Caniffe* (1849), 5 U.C.R. 602.

February 8. IDINGTON, J.:—This is an action to foreclose a mortgage made by the defendant Finley to the plaintiff. The defendant Joyce has been made a party because in possession of a part of the lands in question, and he defends as to that part and claims to have acquired title thereto and to a right of way appurtenant thereto, by virtue of the Real Property Limitation Act. Finley does not defend.

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The defendant Finley, by mortgage deed of the 30th of November, 1897, attempted to convey the lands therein described to the plaintiff to secure the sum of \$2,000 and interest at six per cent. per annum, which is now overdue. The defendant Joyce was and is in possession of a part of the mortgaged premises, and is made a party defendant for the purpose of recovering from him that part occupied by him. He claims to have acquired title to the part thus in question, and a right of way appurtenant thereto, by virtue of the provisions of the Real Property Limitation Act, R.S.O. 1897, ch. 133, and amending Acts. He not only denies the plaintiff's right to eject him, but also seeks by his counterclaim to have it declared that the mortgage in question is not binding upon him and is not a charge upon the lands which he claims, and that the plaintiff's said mortgage is subject to the said right of way, and asks a mandamus directing the plaintiff to discharge the said mortgage so far as it purports to be a charge on the part of the lands thus claimed. The patent from the Crown granting the said lands to the defendant Finley issued on the 5th of August, 1870. Thereafter Finley built on the said lands a row of four houses, of which the one that defendant Joyce entered into the possession of on or about the 1st of November, 1875, as tenant of Finley at a rental of \$150 a year, is that now in question. Finley and Joyce were married to sisters, whose father had at one time some interest in the land. Joyce had been the tenant of Finley, in another house, for some years and up to the time he (Joyce) moved into the house in question. He had fallen much in arrear for the rent of the other house at the time of taking this one. These arrears he seems to have been paying up for some years after his removal, but he never, unless by way of paying the taxes and water rates, which are collected as taxes in Ottawa where the land is, paid any rent for the new house.

The possession of Joyce continued from the time of his first entry until the trial of this action. He has thus clearly acquired, by length of possession, under the Real Property Limitation Act, the land in question, unless the statute has been prevented from running by reason of the payment of rent in the way that is made to appear in the following evidence by

the defendant Finley: "What agreement had you with him? He was to pay the taxes and water rates, and the amount he would pay would be deducted from those amounts here (referring to book) of rent. . . He had been getting behind in the stone house? Well, he was paying \$100 a year more rent there. I was building the four tenements, and he told me he would take the first one in the row and give up the other for less rent. The stone house was \$250 a year and the brick house was to be \$150 a year. And then you say he was hard up, and you told him he could pay the taxes and the water rates? Yes, and deduct it from the rent. How long was that to go on? There was no definite time mentioned." And on cross-examination: "You never had any acknowledgment from Mr. Joyce that you had any interest in 375 Dalhousie street? When he went in he made an agreement to pay me \$150 a year rent. Was that in writing? No. . . How long had he been in this Dalhousie street house when you told him to go and pay the taxes? He might have been a year or two years perhaps. And you had collected no rent in the meantime? No. . . And then you went and told him to pay the taxes? Yes; he had not the rent. Did you ask him to pay the rent at that time? Yes. Did not you tell my learned friend that you had told him to pay the taxes in 1876, when the first six months' rent fell due? Well, perhaps it was, I am not certain. What did Mr. Joyce say when you told him to pay the taxes? He said he would. Were you to give him a receipt for the amount paid on the taxes? No. Anything said about it? No. . . Did you not say anything about rent then? I spoke of the rent first, and he said he had not it, and then said I, you go and pay the taxes and water rates and we will deduct it out of the rent. And that was all that took place between you? Yes. He said nothing but went and paid the taxes? Yes, he said he had no money. And when you told him to go and pay the taxes you are perfectly sure he said nothing but went and paid the taxes? That was all."

I find, notwithstanding the contradiction of the defendant Joyce, that this evidence correctly represents what transpired between him and Finley in relation to the creation and

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continuation of the tenancy in question and the application and applicability of the payment of taxes to the rent of the premises in question.

Assuming for argument's sake that this established the right of Finley to apply the payments of taxes on account of rent, and that in his own mind, though his book does not shew it so, he looked upon these payments as so applied, but failed to communicate that to Joyce, does it entitle the plaintiff to succeed?

I think not. In one view the tenancy may be taken as a tenancy at will, and in another as a tenancy from year to year, but in either view the case falls within sub-sec. 6 of sec. 5 of the Real Property Limitation Act, and the statute began to run, on the facts presented here, on or about the 1st November, 1876, unless any rent since "*payable in respect of such tenancy was received*" by the landlord.

Can the tax collector or the city treasurer, who got any such taxes, be held to have been the agent of the landlord?

Can the landlord constitute such payments, even if made by his direction, of any higher value for the purpose here in question, than the deduction that the Assessment Act declares shall, when there is no agreement to the contrary, be made from rent due by the tenant who, when called upon by the collector, pays taxes the landlord ought to have paid?

I am not prepared to say that the payment of taxes and the appropriation of same to rent due, as a payment or part payment thereof, cannot be taken under any circumstances as a receipt of rent within the meaning of the statute.

It would be competent perhaps for landlord and tenant so to agree that taxes so paid might be held to have been rent received. This evidence, however, falls far short of many conceivable cases of that kind, wherein the statute might be prevented from running.

The term for which this payment of taxes was to have been so applied is quite indefinite. It may have been, and I think probably was, spoken of the then current year's taxes.

It does not seem to me that, without straining the meaning of the language used, it can be made to extend further.

This is not the case of *Finch v. Gilray*, 16 A.R. 484, that

was relied upon in argument. That case was whether or not a covenant to pay taxes as well as rent, constituted the taxes part of the rent.

In this case the rent was fixed, and it was agreed that, at least for one year, the rent might be paid *pro tanto* by the payment of the taxes, and if that had so happened from time to time as to make it clear that the tenant meant his payments of taxes to be treated as part payment of rent, or on account of rent, it might have been possible to uphold such acts on his part, assented to by the landlord, and accepted by him, as payment, as a receipt of rent, that would have prevented the statute from running.

Though the decision of *Finch v. Gilray* does not govern this case, yet I think that much that was said in that case illustrates the principle that must decide this. The following from the judgment of Mr. Justice Maclellan in *Finch v. Gilray*, 16 A. R. 484, at p. 495, expresses what is required to constitute a payment of rent such as is needed for the purpose in question: "I think that even if it could be held that the taxes might be regarded as rent, the payment of them to the municipality would not take this case out of the statute, because what the statute requires is, that it shall be received by the person entitled subject to the tenancy. In *Harlock v. Ashberry* (1882), 19 Ch. D. 539, at p. 545, Jessel, M.R., says: 'The underlying principle of all the Statutes of Limitation is, that a payment to take the case out of the statute must be a payment by a person liable, as an acknowledgment of right,' and he quotes Lord Westbury to the same effect, in *Chinnery v. Evans* (1864), 11 H.L.C. 115, at p. 129. Further on he says: 'That is the theory of all the Statutes of Limitation; the idea is not intelligible except upon the notion of the payment being an admission of right.' And in that case it was held that the payment of rent by a tenant to a mortgagee, under a notice by the latter requiring him to do so, was not a payment of principal or interest within the statute. It was argued that as the rent was the mortgagor's money, intercepted by the mortgagee, which the latter was bound to bring into the mortgage account, it must necessarily be a payment, as between mortgagor and mortgagee, on account of either principal or interest,

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but the argument did not prevail, because compulsory payment by the tenant could not be regarded as an acknowledgment by the landlord."

The quotation in Darby & Bosanquet, 2nd ed., p. 363, from the judgment of Lord Chancellor Cranworth in *Attorney-General v. Stephens* (1855), 6 D.M. & G. 111, at p. 136, expresses the same view.

The quality of admission of right required to fulfil the conditions of the statute, thus expressed, is what is wanting in the tenant's acts here and in the plaintiff's case.

The payment of taxes being compulsory, it is impossible to attribute their payment over so many years to a casual conversation or temporary arrangement. I have not overlooked the fact that the landlord took care to keep an eye on the tenant to see that he did pay them. He is, when pressed, unable to go further and shew that the tenant had in paying been mindful of it as a duty that he owed to his landlord. I am unable to infer anything beneficial for the plaintiff's case from the assessment of the defendant Joyce as tenant, and Finley as owner, that continued all the time. See *McCowan v. Armstrong* (1902), 3 O.L.R. 100, at p. 107.

I must dismiss the action as against Joyce in respect of the land set out in his statement of defence, but under the circumstances without costs.

The plaintiff will be entitled to add his costs of suit, including those incurred by reason of this contestation with the defendant Joyce, to the mortgage debt, as incurred in the reasonable effort to protect the title supposed to have been conveyed to him.

See the cases on that point in Fisher on Mortgages, 4th ed., p. 922 *et seq.*

The counterclaim must be allowed so far as to declare that the mortgage in question is not a charge upon the lands occupied by the defendant Joyce and described in his statement of defence, and that so far as the said defendant is entitled to a right of way, the plaintiff as mortgagee by virtue of the said mortgage is not entitled to interfere with the exercise of such right.

The defendant Joyce will thus be protected as far as he is entitled to be. I do not feel at liberty to direct a mandamus, and there will be no costs of the counterclaim.

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[IN THE COURT OF APPEAL.]

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Criminal Law—Stealing Post-Letter—Decoy Letter—Confession.

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Suspicion having been aroused as to the honesty of a letter carrier, the superintendent of the post-office wrote, in his office in the post-office, a letter to a person in the letter-carrier's district, enclosed it in a duly addressed envelope, placed in the envelope bank notes of which the numbers had been taken, and put upon the envelope a stamp, which was then cancelled by impressing upon it the cancellation stamp of another post-office. The letter was then handed by the superintendent of the post-office to the superintendent of the letter-sorters who gave it to one of the sorters and he placed it in the box in which letters for delivery by the suspected letter-carrier were being placed. The letter did not reach the person to whom it was addressed, and one of the bank notes was used by the suspected letter-carrier and was obtained by a detective and shewn to the post-office superintendent. The superintendent then had an interview with the letter-carrier and accused him of the theft, telling him that he had the bank note in question in his possession, and the letter-carrier acknowledged his guilt:—

Held, that the letter in question was a "post-letter" within the meaning of the definition thereof contained in the Post Office Act, R.S.C. 1886, ch. 35, sec. 2, as amended by 52 Vict. ch. 20, sec. 2 (D.) and 1 Edw. VII., ch. 19, sec. 1 (D.).

Held, also, there having been in fact no inducement or threat, evidence of the confession was admissible, the relationship of the superintendent to the letter-carrier not being in itself sufficient to justify the inference of coercion, and the statement as to possession of the bank-note, even if treated as a false statement, not making the admission of that evidence improper.

Leave to appeal from the judgment of Falconbridge, C.J., K.B., refusing to state a case, refused.

APPLICATION on behalf of the prisoner for leave to appeal and for a stated case under the provisions of the Criminal Code.

The prisoner was placed on trial before Falconbridge, C.J.K.B., and a jury on the charge of stealing a post-letter and of theft of money.

At the trial one Henderson, the inspector at the post-office at Toronto, was about to testify with respect to a statement or

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confession made to him by the prisoner, when counsel for the prisoner objected, and was allowed to examine Henderson as to the circumstances under which the statement was made. Upon the testimony thus elicited, counsel for the prisoner contended that it was shewn that the statement or confession was not admissible, because it was made, as he contended, to a person in authority, and was procured by means of threats or inducements, or by false statements made by Henderson to the prisoner. The statement was admitted in evidence. At the close of the evidence for the Crown, counsel for the prisoner objected that the letters alleged to have been stolen were not post-letters within the meaning of the Act, 1 Edw. VII. ch. 19, sec. 1 (D.). The learned Chief Justice ruled against the objection. The prisoner called no witnesses. Counsel for the prisoner submitted that he was entitled to address the jury last, and that Mr. Proudfoot, K. C., who appeared for the Crown, representing the Attorney-General, was not entitled to reply. The learned Chief Justice ruled that Mr. Proudfoot had the right to reply if he chose to exercise it. Counsel for the prisoner thereupon addressed the jury, and was followed by Mr. Proudfoot. The jury found the prisoner guilty. Counsel for the prisoner applied to the learned Chief Justice to reserve a case upon the three questions raised by his objections, but he declined to do so and remanded the prisoner for sentence. Thereupon counsel for the prisoner applied to this Court.

The motion was argued on the 16th of November, 1904, before MOSS, C. J. O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A.

L. V. McBrady, K. C., for the prisoner. The letter in question was not a "post-letter" within the meaning of the Act, and was not "deposited" in a post-office: *Reg. v. Rathbone* (1841), 2 Moody 242, Car. & M. 220; *Reg. v. Shepherd* (1856), Dears. C.C. 606, 25 L.J.M.C. 52; *Reg. v. MacDonald* (1896), 2 Tremeear 221; *Reg. v. Harley* (1843), 1 C. & K. 89. The word "deposited" is not in the Imperial Act, but the gloss placed upon that Act by the decisions above cited, viz., that it relates only to letters dealt with in the ordinary course of business, must also be placed upon the Act now in question.

Evidence of the alleged confession should not have been received. The confession was obtained by threats and pressure by a person in authority, and in consequence of a false statement of fact by that person: *Reg. v. Thompson*, [1893] 2 Q.B. 12; *Reg. v. Rose* (1898), 67 L.J.Q.B. 289; *Reg. v. MacDonald*, 2 Tremear 221; *Reg. v. Jackson* (1898), 2 Tremear 149; Joy on Confessions, p. 7. [As to the right of reply, the learned Counsel relied on the arguments addressed to the Court on a previous day in *Rex v. Martin*.]

J. R. Cartwright, K. C., for the Crown. The English authorities do not apply, the wording of the Canadian Act being much wider. The letter was undoubtedly deposited in the post-office, and reached the prisoner's hands for delivery in the ordinary way. There was no false statement and no threat, and evidence of the confession was properly received: *Rex v. Thornton* (1824), 1 Moody 27; *Rex v. Court* (1836), 7 C. & P. 486; *Reg. v. Day* (1890), 20 O.R. 209; *Reg. v. Elliott* (1899), 31 O.R. 14. As to the right of reply, see in addition to the authorities referred to in the *Martin* case, Norton-Kyshe's Law and Privileges relating to Colonial Attorneys-General, pp. 11, 106, and Law and Privileges relating to the Attorney-General of England, p. 14.

McBrady, in reply.

January 23. Moss, C.J.O.:—With regard to the objection that the letters were not post-letters, the Act, 1 Edw. VII. ch. 19 (D.), contains language not to be found in the Imperial Post Office Act. By our Act the expression "post-letter" is made to include any letter deposited in any post-office, and the question is, whether upon the evidence the letters alleged to have been stolen can be said to have been deposited in the Toronto Post Office so as to render the taking and non-delivery of them by the prisoner the offence of stealing post-letters.

It is not necessary to state the evidence in detail. The prisoner was a letter carrier employed in the Toronto Post Office. He was assigned to a certain district in the city within which to deliver letters. The letters in question were written by Henderson, the inspector; were enclosed in envelopes and addressed by him to persons within the prisoner's district, and

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were stamped and handed to one Stoddard, the superintendent of the letter sorters, with instructions to place them, or cause them to be placed, in the usual place for letters intended for delivery by the prisoner. Stoddard handed them to one Humphries, a letter sorter, whose business it was to sort letters and distribute them among the various letter carriers for delivery by them. Humphries placed the letters in the prisoner's wicket and saw him take them out. They were so placed by Humphries in the ordinary and usual way, and were received by the prisoner in the regular course of his duty.

Unless it is to be held that no letter that is not dropped into the post-office from the outside can be a letter deposited in the post-office, the letters in question were deposited. If they had been taken and dropped from the outside into the receiving box there could be no question of their having been deposited. They could not have been reclaimed by the sender; they had become the property of the persons to whom they were addressed: R.S.C. 1886, ch. 35, sec. 43.

Can it matter that they came to the hands of the proper official in such manner as to render it his duty to see that they were put in due course for delivery to the persons to whom they were addressed, and were then by him placed in the proper place in the post-office, from which it was the duty of the prisoner to receive and deliver them, without their having been brought into the post-office from the outside? It is difficult to see why they are not as well deposited in the post-office in the one case as in the other.

The statement or confession was properly admitted by the learned Chief Justice.

It cannot be said that threats were made or inducements held out by Henderson, and if it be assumed, though it is not to be taken as so found, that Henderson made an untrue statement as to his possession of one of the bank bills which were enclosed in the letters, that would not render the statement inadmissible.

The last ground is disposed of by what has been said in the case of *Rex v. Martin*.

The application must be refused.

OSLER, J. A.:—The prisoner was convicted of stealing a post-letter. He now moves for leave to appeal and to have a case stated under section 744 of the Criminal Code, on the grounds (1) that the letter was not proved to be a post-letter within the meaning of the Post Office Act and amendments thereto; (2) that an alleged confession of the accused to one Henderson, a post-office inspector, had been improperly admitted; and (3) that the trial Judge had erred in ruling that counsel for the Crown had the right of reply, and in directing the counsel for the accused to address the jury first at the close of the case, although no evidence had been given or witnesses called on behalf of the accused.

As to (1), it appeared that the accused was a letter carrier in the city of Toronto, and that the letter in question was a decoy letter written by an official in the post-office and addressed to a person within the district in which it was the duty of the accused to carry and deliver letters. The letter was post-marked, though not with the stamp of the Toronto office. It did not appear by whom this was done, or whether the duty of stamping was confined to a single official. It was handed by the writer to the superintendent of the letter sorters in that office, with instructions to have it placed among other letters intended to be delivered by the prisoner. It was handed by him to a letter sorter who, in the performance of his usual duties in sorting and distributing letters to be handled by the letter carriers, placed it in the usual place with others which the prisoner was to take up, carry away, and deliver, and the prisoner in the course of his duty took it with the rest, but instead of delivering it, opened it and stole the money which had been placed therein.

Mr. McBrady relied upon cases decided under the provisions of the Imperial Post Office Acts, which would be very much in point if the language of our own Act were the same. But "post-letter" is now defined as "any letter transmitted by the post or delivered through the post, or *deposited in any post-office*. . . And a letter shall be deemed a post-letter from the time of its being so deposited to the time of its being delivered to the person to whom it is addressed, or so long as it remains in the post-office . . . or is being carried through

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the post:" 52 Vict. ch. 20, sec. 2 (D.); 1 Edw. VII. ch. 19, sec. 1 (D.), amending the Post Office Act, R. S. C. 1886, ch. 35, sec. 2.

It cannot be necessary in the case of a letter written by a person, official or otherwise, within the post-office, that it shall be taken outside the office and deposited from there in a letter-box or in the ordinary receptacle used by the public at the principal office, in order to acquire the character of a letter deposited in a post-office. It is at least sufficient for that purpose if, as was the case here, it passes from the hand of the writer to that of any other official whose duty it is to put it in due course of transmission by post to the person to whom it is addressed, or (probably) when it has been post-marked in the office with the official stamp. When that has been done it becomes, in my opinion, a letter deposited in the post-office within the meaning of the Act. It has passed beyond the control of the sender and has become the property of the addressee by force of R.S.C. 1886, ch. 35, sec. 43 (1).

The clause of the Act, 52 Vict. ch. 20, sec. 2 (D.), for which that of 1 Edw. VII. ch. 19, sec. 1 (D.) was substituted, was in similar terms to the extent to which I have above quoted the latter, and under that it was held in *Rex v. Trepanier* (1901), Que. L.R. 10 K.B. 222, that a letter delivered to a letter carrier even in the post-office was a post letter, and that he might be convicted under the provisions of the Criminal Code for stealing it.

The only hesitation I have felt on this point arose from the circumstance of the letter having been (apparently) falsely post-marked with the stamp of the Orillia post-office, but nothing was said of this at the trial or on the argument of the motion, and I therefore cannot say whether anything could have been made of it if it had been investigated. On the facts proved, I think the jury were properly told that the letter had been deposited in the Toronto office.

(2) As to the confession. Among the legion of "varying voices" on this subject, one clear and satisfactory rule is laid down—perhaps I should say affirmed—by a court of considerable authority in the recent case of *Reg. v. Thompson*, [1893] 2 Q.B. 12, 17 Cox C.C. 641, namely, that in order that the

confession of a prisoner may be admissible, it must be proved affirmatively to the satisfaction of the trial Judge that it was made freely and voluntarily, and not in response to any threat or to any suggestion of advantage to be inferred either directly or indirectly from language used by a person in a position of authority in connection with the prosecution of the person by whom the confession was made. See also *Reg. v. Day*, 20 O.R. 209; *Reg. v. Elliott*, 31 O.R. 14.*

I am quite satisfied, after having carefully read the evidence of the inspector, who certainly had the right to interrogate the accused, that this condition was complied with; that neither threat nor promise was made or held out by him, and that the confession was free and voluntary, and was properly admitted by the trial Judge.

I should add, as Mr. McBrady strongly urged that it was partly induced by some misstatement of fact on the inspector's part, that the evidence does not bear out the contention that there was in fact any such misstatement.

We have in the case of *Rex v. Martin* disposed of the remaining point, as to the right of reply, adversely to the accused.

The motion for leave must therefore be refused.

MACLAREN, J.A.:—The first point urged by counsel for the prisoner was that the letter in question was not a "post letter." In support of this proposition two English cases were cited: *Reg. v. Rathbone*, 2 Moody 242, Car. & M. 220; and *Reg. v. Shepherd*, Dears. C.C. 606, 25 L.J.M.C. 52. There can be no doubt that these cases in several respects closely resemble the present. It is necessary, however, to compare the English Post Office Act in force when they were decided, with our own. In the former, 1 Vict. ch. 36, s. 47, it is enacted that a "post-letter shall mean any letter or packet transmitted by the post under the authority of the Postmaster-General, and a letter shall be deemed a post-letter from the time of its being delivered to a post-office to the time of its being delivered to the person to whom it is addressed." Our Act, 1 Edw. VII. ch. 19, sec. 1, reads: "The expression 'post letter' means any

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* See *Rex v. Knight* (1905), 21 Times L.R. 310.—REF.

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letter transmitted by the post or delivered through the post, or deposited in any post-office, or in any letter-box put up anywhere under the authority of the Postmaster-General, whether such letter is addressed to a real or a fictitious person or not, and whether it is intended for transmission by the post or delivery through the post or not; and a letter shall be deemed a post letter from the time of its being so deposited to the time of its being delivered to the person to whom it is addressed, or so long as it remains in the post-office or in any such letter-box or is being carried through the post."

In the *Rathbone* case the decoy letter was, in the momentary absence of the prisoner, placed by the writer, an assistant inspector, in a heap of letters which the prisoner was about to sort. The report of the judgment on this point is very meagre, being contained wholly in the following words of Baron Parke: "The objection was that it was not a post-letter, or a letter put into the post; and the Judges are unanimously of opinion that that objection must prevail, the statute only applying to letters put into the post in the ordinary way." The judgment is explained by Willes, J., at p. 53 of 25 L.J.M.C., where he says: "*Reg. v. Rathbone* shews that to make a man liable, the letter must have come into his hands in the ordinary course of the post-office." In *Shepherd's* case the letter was written by one inspector, who gave it to a second inspector, who gave it to a third, who locked it up over night, and in the morning gave it to a fourth person, who surreptitiously mixed it with letters which the prisoner was about to sort.

In neither of these cases did the letter in question come into the hands of the prisoner in the regular way, or from any person authorized to deliver it to him, or to handle it at all.

In the *Shepherd* case, at p. 611, Pollock, C.B., says: "The person who first received the letter was not entitled to receive it, and he handed it to a person who was not entitled to take it; in fact, no one received the letter who was authorized so to do." Willes, J., says on the same page: "The letter in this case was not put into the post in the ordinary way, nor does it appear that any person who received it was justified in receiving it."

On the other hand, the letter in question in the present case

was received by the accused in the ordinary way at his wicket, where it was placed by Humphries, a sorter, in the regular course of his duties. It is unnecessary for us to decide when it became a post-letter. If written by Henderson in his own office in the post-office building, and delivered there to Stoddard, it may be that it did not become a post-letter until deposited in the post-office proper with Humphries. It is sufficient that it became a post-letter at the latest when it came into the hands of Humphries, and continued to be such until stolen by the accused. It can scarcely be seriously argued that if the inspector or the postmaster, or any other official in the post-office building, wishes to post a letter, it is necessary that it should be carried outside and thrust through the aperture provided for the general public in order to make it a post-letter within the meaning of the Act.

With regard to the confession made by the accused to Henderson, I am of opinion that it was properly received. Henderson states emphatically that no threat was made, or inducement of any kind held out, and there is no evidence to the contrary. This was scarcely controverted; but it was argued that the confession could not be considered free and voluntary on account (1) of Henderson's official relation to the accused; (2) of being the result of an interrogation of the accused in Henderson's office; and (3) of Henderson's stating that he had one of the bills when in fact he had not. In my opinion none of these grounds, in so far as they may be supported by the evidence in this case, is sufficient to exclude the confession. It is true that Henderson had not the bill in his actual possession, but it was under his control, being in the hands of the detective, and this was explained to the accused before the confession was made. Even an untrue statement would not be sufficient to exclude the confession. There must be something calculated to excite hope or fear in the breast of the accused. No doubt if the confession is made to a person in authority slighter evidence of the inducement or threat may suffice to exclude it. Here, however, the uncontradicted evidence expressly negatives any threat or inducement whatever.

The third ground of objection, relating to the right of reply granted to the representative of the Attorney-General, has been

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dealt with in the judgment of this Court in the case of *Rea v. Martin*.

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Jan. 26.

*Bills of Exchange—Indorsement in Blank—Alteration to Special Indorsement—
Subsequent Substitution of Name of New Special Indorsee.*

A bank, being the holders in due course as collateral security to the account of a customer of a promissory note indorsed in blank, put their name with a stamp immediately above the indorser's name, thus converting the indorsement into a special one. Subsequently, and after maturity of the note, the account was taken over by the plaintiff bank, the intention being that the note in question and other collateral notes should pass with the account. The manager of the transferring bank handed the notes to the manager of the plaintiff bank, who, with a stamp, superimposed upon the name of the transferring bank the name of the plaintiff bank, the manager of the transferring bank authenticating the change by his initials:—

Held (STREET, J., dissenting), that there had been a valid transfer, and that the plaintiffs were holders of the note in due course.

Judgment of MORGAN, Co.J., affirmed.

APPEAL by the defendants from the judgment at the trial

This was an action in the county court of the county of York brought by the Sovereign Bank of Canada upon a promissory note made by the defendants for \$433.33, dated the 19th of November, 1901, payable on the 1st of March, 1903, to one G. M. Boyd or order, of which the plaintiffs alleged themselves to be the holders in due course.

The defendants denied that the plaintiffs were holders of the said note, and alleged that the note had been obtained by fraud on the part of the payee.

After the pleadings were at issue, the defendants moved to change the place of trial from Toronto to the town of Sault

Ste. Marie. The motion was argued in Chambers, and an order was taken out reciting that "the plaintiffs, by their counsel, undertaking to prove at the trial as part of their case that they are entitled to the rights of a holder in due course, as defined by sec. 29 of the Bills of Exchange Act, of the note in question in this action, and in default of such proof that the action shall be dismissed as against them with costs." It was ordered that the motion to change the place of trial should be dismissed.

The action then came on for trial before His Honour Judge Morgan in the county court at Toronto on the 26th of September, 1904, when the following facts appeared. G. M. Boyd, the payee of the note, indorsed it in blank and delivered it to a firm of Graham Bros. about ten months before it became due, and Graham Bros. then delivered it to the Standard Bank of Canada at their office at Stouffville, as collateral security, with other notes, for an overdraft of some \$13,800 owed by them to the bank. The manager of the Standard Bank, upon receiving this note, stamped on the back, over the blank indorsement of G. M. Boyd, the words "pay Standard Bank of Canada or order," thus converting it into a special indorsement to that bank. On the 23rd of April, 1903, the Sovereign Bank of Canada at Stouffville agreed to take over from the Standard Bank the account of Graham Bros., and paid the Standard Bank the \$13,800 due them, and received from them the collateral notes held by them, including that sued on in this action. The managers of the two banks met to complete the transfer of these collateral notes, and as each note was handed to the manager of the Sovereign Bank he stamped the words "pay to the order of the Sovereign Bank of Canada" over the words already existing there, "pay Standard Bank of Canada or order," so as partly to obliterate them, but not so that both indorsements cannot be plainly made out. The manager of the Standard Bank initialled the alteration effected by the second stamp.

Upon these facts the learned Judge found that the intention of the two managers was to transfer to the Sovereign Bank all the title of the Standard Bank to the note, and that the effect was that the Sovereign Bank became the holders of the note and entitled to maintain the action. He found that

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the note was duly made by the defendants, and directed judgment to be entered for the amount of the note with interest and costs. The terms of the order in Chambers were fully stated to the learned Judge at the opening of the case.

The defendants' appeal from this judgment was argued before a Divisional Court [FALCONBRIDGE, C.J.K.B., STREET, and BRITTON, JJ.] on the 30th of November, 1904.

J. Grayson Smith, for the appellants. Upon the evidence the finding should have been that the note had not been signed by five of the appellants, and also that value had not been given. The plaintiffs have also failed to discharge the onus accepted by them on the motion to change the venue of shewing that they are holders in due course of the note in question. The mode of indorsement relied on is invalid. The Standard Bank could not, after exercising the right to change Boyd's indorsement in blank into a special indorsement in their favour, undo what had been done. After that change had been made, title could be made only by a formal indorsement by them: see Byles, 16th ed., pp. 184, 420; *Good v. Walker* (1892), 61 L.J. Q.B. 736; *Day v. Longhurst* (1893), 62 L.J.Ch. 334.

S. B. Woods, for the respondents. There is nothing in the contentions as to forgery or want of value, nor is the objection to title made out. There was in effect an indorsement by the Standard Bank by their manager, but even if that was not regular and must be disregarded, the plaintiffs obtained a good title. The Standard Bank had the right to strike out or to allow the striking out of the special indorsement made by them, and when that had been struck out, the note again became payable to bearer, and was validly transferred to the plaintiffs, who after that, as they had the right to do, merely made a new special indorsement to themselves.

Grayson Smith, in reply.

January 26. FALCONBRIDGE, C.J.:—That branch of the appeal which complained of the learned Judge's finding that the note had been signed by those defendants who denied their signature, was not very strongly pressed, and the evidence appears fully to sustain the judgment.

The vital question for decision in the case is, whether the

plaintiffs succeeded in proving what they undertook to prove when the motion to change the place of trial was dismissed.

Upon this point the judgment of the learned Judge is as follows:—

“This is an action upon a promissory note brought by the plaintiffs against the defendants as joint and several makers thereof, which note is for the sum of \$433.33, payable on the 1st March, 1903. The note was made payable to the order of one G. M. Boyd, who transferred it to Graham Bros., indorsing the same in blank. Graham Bros. transferred the note in question to the Standard Bank of Canada, who subsequently transferred it to the plaintiffs, the Sovereign Bank of Canada. I find on the evidence that G. M. Boyd, the payee of the note in question, transferred the same to Graham Bros. by his indorsement on the note in blank, who thereupon became the holders thereof in due course—that is to say, taking it before maturity for valuable consideration, and without notice of anything which would vitiate the same in the hands of an innocent holder. I also find that the note being so indorsed in blank by G. M. Boyd was transferred by Graham Bros. to the Standard Bank for valuable consideration, and before maturity thereof, and without notice to the Standard Bank of anything which would vitiate the note, and that the Standard Bank thereupon became the holders of the said note in due course. I find on the evidence that the Standard Bank, after having received the note so indorsed by Boyd in blank, placed above the signature of Boyd their bank stamp making the same payable to themselves or order, thus converting the indorsement by Boyd into a special indorsement. I find on the evidence subsequently the Standard Bank, after the note became due, transferred the same to the Sovereign Bank by delivery of the note to them for valuable consideration and without notice of anything affecting the validity of the note, and at the time of such transfer there was stamped on the promissory note over the stamp of the Standard Bank the stamp of the Sovereign Bank, making the same payable to the Sovereign Bank. I find that this stamp was placed on the note at the instance of the Standard Bank, and was initialled by the manager of the bank, and that the whole transaction was intended by both banks to

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be a transference of all the right, title and interest of the Standard Bank in the note in question. These findings, I think, dispose of the question raised at the trial that the plaintiffs are not the holders of the note and entitled to maintain an action thereon."

I agree with the learned trial Judge in holding that the transaction was intended by the banks to be a transfer from the one to the other, and that the plaintiffs are therefore holders in due course. The mode adopted, no doubt with a view of saving a little time and trouble, was a very rough and ready one, and one that, in view of the conflict of judicial opinion on the subject, is not likely to be adopted in the future.

Formerly, when a bill was once indorsed in blank, its negotiability could not afterwards be restrained by a special indorsement: *Smith v. Clarke* (1794), 1 Peake 295, 1 Esp. 179; *Walker v. Macdonald* (1848), 2 Ex. 527. And in the United States it has been often held that where the draft or bill was indorsed by the payee in blank, and was by the next holder indorsed specially, the first indorsement being in blank the bill was afterwards transferable by mere delivery, and that a holder by delivery may strike out the special indorsement, and in a suit against the acceptor declare and recover as the indorsee of the payee: see *Mitchell v. Fuller* (1850), 15 Pa. St. 268; *Johnson v. Mitchell* (1878), 50 Texas 212, stating the rule: "If a bill be once indorsed in blank, though afterwards indorsed in full, it will still, as against the drawer, the payee, the acceptor, the blank indorser, and all indorsers before him, be payable to bearer, though as against the special indorser himself title must be made through his indorsee." *Bank of Utica v. Smith* (1820), 18 Johns. N.Y. 229 (where, however, the holder filled up the blank merely for the purpose of collection); *Habersham v. Lehman* (1879), 63 Ga. 380.

It is said, however, that since the Bills of Exchange Act was passed (sec. 8, sub-sec. 3) this is no longer law: Byles, 16th ed., p. 178, note (c); Maclaren, 3rd ed., p. 67.

I rest my judgment, therefore, on the ground taken by the learned trial Judge.

The appeal will be dismissed with costs.

BRITTON, J.:—The question for determination upon the present appeal is, are the plaintiffs entitled to the rights of a holder, in due course, as defined by sec. 29 of the Bills of Exchange Act, of the note sued upon in this action?

The note was made payable to G. M. Boyd or order. Boyd indorsed the note in blank, and handed it so indorsed to the firm of Graham Bros., who in due course transferred the note, while it was current, to the Standard Bank of Canada.

It must be conceded that, upon the evidence, and as found by the learned county court Judge, the Standard Bank of Canada were *bonâ fide* holders for value of this note, without notice of anything as between the makers and payee that would vitiate or invalidate it.

The issue as to the making of the note was found against the defendants, and, on appeal, the argument against that finding was not strongly urged, nor could it be successful in the face of evidence, conflicting it is true, but quite sufficient to warrant the conclusion at which the learned trial Judge arrived. As I have said, the whole question is, have the plaintiffs the rights of a holder in due course as to this note? If the plaintiffs have a title to this note, derived through the Standard Bank in due course, they have, under sec. 29, sub-sec. 3, of the Act respecting Bills of Exchange, all the rights of the Standard Bank against the makers.

As the payee, Boyd, indorsed the note in blank, it became transferable by delivery, and so came into the possession of the Standard Bank. The Standard Bank, being the holders, could convert, and did convert, the blank indorsement into a special one to themselves: see sec. 34, sub-sec. 4, of the Act.

Having done this, it is argued that they cannot strike out the special indorsement, put on by themselves, so as to restore to the note its condition of being transferable by delivery, and that after a special indorsement is made by the holders to themselves, the note can only be transferred by their indorsement.

I am unable to assent to this, and, with great respect for the opinion of my brother Street, who has so carefully considered this case, I think that conclusion is not supported by the authorities cited.

A good deal of evidence was given and argument advanced

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as to what was really intended and what was actually done by the Standard Bank in dealing with the note when Graham Bros.' account was taken over by the plaintiffs.

What was done was this: the Standard Bank removed from the note the words converting the blank indorsement into a special indorsement, which words they themselves placed there, and then—the note again being, as it had been when it came into their hands, transferable by delivery—they handed the note to the plaintiffs for value. That is in effect what was done. The actual obliteration or removal of the words, “pay Standard Bank of Canada or order” was done by the hand of the manager of the plaintiff bank at Stouffville, the manager of the Standard Bank standing by and assenting to what was done, and authenticating it by putting his initials upon the note. This obliteration was done by the hand of the plaintiffs' manager, as the plaintiffs were to become the holders of the note, and they did become the holders of it by delivery to them.

It was a clumsy way to accomplish what was intended, and the object of doing it in that way was apparently to save a few minutes time.

No doubt the ordinary business method would have been for the Standard Bank to have indorsed the note, “without recourse,” or, if I am right in thinking that the Standard Bank could have struck out the words placed by them over the signature of G. M. Boyd, they should have done so, allowing the plaintiffs, as their transferees, to convert the then blank indorsement into a special one, or as they pleased.

If the payee himself had made his indorsement special, instead of in blank, his indorsee would not have the right to strike out such special indorsement, or if, after such special indorsement had been made by the Standard Bank, the payee had adopted it, and notified the bank that he would not consent to such indorsement being struck out, the case might have been different, but so long as the relations between the parties are in no way changed, as between the payee and the holder there is authority to the holder, while he remains the holder, to remove words which he himself put on, and which do not affect the liability of the payee.

Grimes v. Piersol (1865), 25 Ind. 246, is a case in which

the special indorsement made by the payee was changed by striking out the name of the special indorsee and inserting the name of another who had come into possession of the note. It was held that this was a material alteration, and no recovery could be had against the indorser.

That case clearly distinguishes between what cannot be done by a holder against the express act of the payee, and what may be done by a holder who receives a note indorsed in blank.

It is to be noticed that this is not an action against the indorser, but only against the makers, and the only point is as to the transfer of the note.

There is no attempt to add to the liability of the indorser. The reason for converting the blank into the special indorsement was no doubt to guard against loss by accident or theft. Suppose, after this note had been received by the Standard Bank, and after making the special indorsement thereon, the bank, on its own mere motion, had cancelled the special indorsement, and thereafter the note had been lost and had gotten into the hands of an innocent holder for value, could either the Standard Bank or the indorser be heard to say that there was no right to so cancel the words making the indorsement special, or that the note was not transferable by delivery?

The decision must go that far to disentitle the plaintiffs here.

In the old case of *Vincent v. Horlock* (1808), 1 Camp. 442, Lord Ellenborough said: "When a bill is indorsed by the payee in blank, a power is given to the indorsee of specially appointing the payment to be made to a particular individual, and what he does in the exercise of this power is only *expressio eorum quæ tacite infunt*."

The indorsee, the defendant in that case, converted the blank indorsement into a special one in favour of the plaintiff. The defendant was held not liable, but no question was raised as to the plaintiff's title as holder of the bill or as to his right to recover against the person who had indorsed in blank.

In this case, if the Standard Bank had in the first instance written in the name of the Sovereign Bank, it would have been good. That is practically what was done, but only after the

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name of the Standard Bank had been written in and obliterated. So it comes back to the one question, had the Standard Bank, having elected to write their own names as payee, the right to cancel that, restoring to the bill its character as one indorsed in blank, and so transferable by delivery? Where there is no change in the relation of the parties, and no prohibition, express or implied, on the part of him who had indorsed in blank, I think the change could be made.

The case of *Walters v. Neary* (1904), 20 Times L.R. 555,* seems to me not opposed to the view taken by me. The plaintiff advanced money to the acceptor of a bill, drawn by the defendant to his own order, but not indorsed. It was held that the plaintiff was the holder within sec. 31, sub-sec. 4, of the English Bills of Exchange Act, 1882; see the corresponding sub-sec. 4 of sec. 31 of the Canadian Act.

Porter v. Cushman (1858), 19 Ill. 572, may be referred to. The headnote is as follows: "If proof shall be made that the special indorsee has parted with the note for a consideration, and that the holder has it rightfully, then it would seem that such an alteration of the indorsement would not be improper."

The old case of *Clerk v. Pigot* (1698), 12 Mod. 192, was decided as such a case would now be decided, but certainly the point there raised—that the holder of a bill, with his indorsement upon it, would have no right to sue because putting his name in blank was evidence that the bill had been transferred—would not now be thought worth mentioning in Court.

I think the appeal should be dismissed with costs.

STREET, J. (after stating the facts as above set out):—We are governed in considering this case by the terms imposed on the plaintiffs by their undertaking, set out in the chambers order, and repeated at the opening of the trial, that the action is to be dismissed with costs unless the plaintiffs prove at the trial as part of their case that they are entitled to the rights of a holder in due course as defined by sec. 29 of the Bills of Exchange Act.

By sec. 2 of that Act, sub-sec. (g), a "holder" is defined to be the payee or endorsee of a bill or note who is in possession

* Affirmed by the Court of Appeal (1904), 21 Times L.R. 146.—REF.

of it, or the bearer thereof; and by sec. 29 a holder in due course is a holder who has taken a bill complete and regular on the face of it, under the following conditions, viz. :—

(a) That he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact.

(b) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

The evidence, I think, establishes that the Standard Bank became holders in due course within the meaning of this section by the delivery to them, for a valuable consideration, by Graham Bros. of the note indorsed in blank by Boyd, the payee.

They then had the option of allowing the note to remain payable to bearer, or of making it payable to their own order by writing over Boyd's signature a special indorsement to themselves. They chose the latter alternative, and the special indorsement thereupon became a part of the written contract of the indorser, and could not, I think, be varied as against him without his consent. The note at the same time, and by the same act, became transferable as against the makers as well as against Boyd only by the indorsement of the Standard Bank as special indorsees. Then they agreed for value with the plaintiffs to transfer the note to the plaintiffs, but without themselves becoming liable as indorsers. Instead of indorsing it without recourse, which was the ordinary and businesslike manner of transferring the note, they joined with the plaintiffs in the act of cancelling the existing special indorsement, and substituting a new special indorsement to the plaintiffs.

I have been unable to obtain any express authority upon the point either in England, Canada, or the United States, but I can find nothing in support of the efficacy or propriety of the method of transfer here adopted. If it had the effect of transferring the legal title to the note from the special indorsee, then it would seem that a mode of transfer of bills and notes has been discovered of which no trace is to be found in the cases or text books, and which seems in conflict with sub-sec. 4 of sec. 34 of the Bills of Exchange Act. If the Standard

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Bank could erase the special indorsement to itself, then the Sovereign Bank, upon transferring its rights to another, could do so by substituting the name of the new owner for its own, and so on through any number of transactions.

It was argued that the Standard Bank could at any time, while it retained the note, have altered that which it had written. I think the answer is that they had an option to write a particular contract over the name of the blank indorser, and having exercised the option deliberately they had no right to substitute a new contract.

Sub-sec. 4 of sec. 34 of the Bills of Exchange Act sets forth the only power possessed in this respect by the holder: "When a bill has been indorsed in blank, any holder may *convert* the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the bill to the order of himself or some other person." As I understand this section, when the holder has exercised the power given by this section, the bill is *converted* once for all into one payable only to the order of the person whose name is so written; the Act gives no authority to convert it back into a bill payable to bearer. If this special indorsement had been written over the name of any indorser subsequent to the payee, a subsequent holder might strike out all the intervening indorsements between the original indorsement in blank of the payee and himself, because he could make title without them. In the present case that could not be done, for he requires the indorsement of the payee to enable him to make title at all. The effect of the contract between the two banks was to transfer all the rights of the Standard Bank to the Sovereign Bank, but to leave the legal estate in the note still in the Standard Bank. The plaintiffs are therefore only the equitable owners of it, and are not holders in due course within the meaning of the 29th section of the Act. The counsel for the plaintiffs at the trial clearly stated the position they were in. He said: "My learned friend" (the counsel for the defendants) "moved before the Master in Chambers at Osgoode Hall to change the venue in this action from Toronto to Sault Ste. Marie. I undertook to prove on behalf of the plaintiffs that they were the holders in due course of that promissory note, and upon that the motion

was dismissed. There is the whole thing. The matter is now before your Honour, and if I fail to prove that the Sovereign Bank, the plaintiffs here, are the holders in due course, and entitled to recover, I fail in the case."

Had it not been for the undertaking contained in the order in Chambers above set forth, and repeated and explained at the trial, it would have been proper to allow the plaintiffs to amend upon payment of the costs of the trial (which was mainly directed to the question here decided against the plaintiffs) by adding the Standard Bank as parties. We seem to be precluded, however, by the terms of the undertaking from doing anything but dismissing the action. The appeal should therefore, in my opinion, be allowed with costs and the judgment below set aside, and judgment be entered below dismissing the action with costs, but without prejudice to the bringing of a further action upon the note by the plaintiffs, either alone or with the Standard Bank as parties, plaintiffs, or defendants.

See *Clerk v. Pigot*, 12 Mod. 192; *Vincent v. Horlock*, 1 Camp. 442; *Porter v. Cushman*, 19 Ill. 572; *Grimes v. Piersol*, 25 Ind. 246; *Walters v. Neary*, 20 Times L.R. 555; 2 Parsons on Notes, 2nd ed., p. 19; Daniel on Negotiable Instruments, 5th ed., sec. 574; Maclaren on Bills, 3rd ed., pp. 209, 210.

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SMITH V. NIAGARA AND ST. CATHARINES RAILWAY COMPANY.

Dec. 27.

Negligence—Railways—Dangerous Crossing—Failure to Give Warning—Contributory Negligence.

A siding of the defendants' line of railway, which was not used by the defendants more than two or three times a week, crossed a narrow arched-in lane or alleyway, held on the evidence to be a highway, very close to the face of the walls. The plaintiff's servant had driven the plaintiff's horse and waggon across the siding and through the alleyway to a warehouse close by, there being no engine or cars on the siding. The waggon was within a short time loaded with boxes, and the plaintiff's servant then returned through the alleyway, the servant walking beside the waggon in order to steady the load. Just as the horse came out of the alleyway it was struck by a passing engine and severely injured. The whistle of the engine had not been sounded nor the bell rung. The plaintiff's servant did not stop the horse at the mouth of the alleyway or look or listen for trains:—

Held, that assuming, but not deciding, that the duty to sound the whistle or ring the bell did not apply in the case of engines using a siding, it was nevertheless incumbent upon the defendants to give some warning before crossing the lane, especially in view of the very dangerous nature of the crossing, and that, not having done so, they were guilty of negligence and *prima facie* liable in damages.

Held also, that under all the circumstances it could not be said that there was not some evidence to support the finding of the Judge at the trial (the case having been tried without a jury) that the plaintiff's servant had not acted unreasonably, and was therefore not guilty of contributory negligence. Judgment of the county court of Lincoln affirmed.

APPEAL by the defendants from the judgment at the trial.

The action was brought in the county court of the county of Lincoln to recover damages for injuries to the plaintiff's horse caused, as was alleged, by the negligence of the defendants, and was tried before Carman, Co.J., without a jury, judgment being given in the plaintiff's favour for \$175 and costs.

The appeal was argued before a Divisional Court [FALCONBRIDGE, C.J.K.B., STREET, and BRITTON, JJ.] on the 29th of November, 1904. The facts are stated in the judgments, and the cases relied on are there referred to.

W. H. Blake, K.C., for the appellants.

A. W. Marquis, for the respondent.

December 27. FALCONBRIDGE, C.J.K.B.:—I have had an opportunity of reading the judgment prepared by my brother Street, and I agree in the conclusion at which he has arrived.

STREET, J.:—The facts were not in controversy: a servant of the plaintiff was driving the plaintiff's horse and waggon along a narrow way which led across a track of defendants in the village of Merritton. The way was arched over and the view on both sides was obstructed by buildings and other obstacles which hemmed in the way on both sides until within a distance of 3 ft. 6 inches of the track of the defendants. The waggon was piled high with empty tin cans, and the way being uneven the servant was occupied as he passed under the archway in holding the cans on his waggon to prevent them falling off. As he emerged from the archway travelling at a walk the horse was struck by an engine of defendants, in charge of four men, which had just shunted some cars to a lime house near the spot and was returning at a rate of from two to four miles an hour past the archway. The plaintiff's horse was forced against the side of the archway and injured, and this action was brought to recover damages for its injury. The plaintiff's servant was not looking out for an engine or trains: the persons on the engine had whistled and sounded the bell a short time before the accident, but had not done so for a time which they variously estimated at from a minute and a half to four minutes before the accident. The siding upon which the accident took place was only used by the defendants two or three times in each week. The way in question is used by the public constantly, and a sidewalk has been built upon it by the Merritton council. Waggoners have long been in the habit of using it to go to and from the bank of the canal to which the sidewalk also leads. Upon these facts the learned Judge found that the way was a public highway: that the defendants had been guilty of negligence in not taking proper precautions, and that the plaintiff's servant had not been guilty of contributory negligence, and he assessed the damages at \$175.

The evidence seems to establish that the road or way upon which the plaintiff's servant was driving his horse at the time of the accident was a "highway" within the meaning of sub-sec. (g) of sec. 3 of the Railway Act of 1888.

The point at which this highway emerges from the archway and strikes the siding is so close to the rails, and the view of the track on each side is so completely obstructed until

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the traveller approaching it has almost put his foot on the nearest rail, that the crossing is an unusually dangerous one. The question then arises whether the defendants took reasonable and proper precautions to guard against accidents considering the dangerous character of the place in question. It is admitted that the precautions of ringing the engine bell and blowing the whistle required by the 256th sec. of the Railway Act of 1888 were not complied with: but the defendants dispute the application of that section to the case of an engine shunting cars in the railway yard as this one was doing. I do not think it is necessary to determine that question here. The cases seem to have established that apart from that section, and in cases in which it is not applicable a duty is cast upon the defendants to take reasonable precautions at dangerous points for the avoidance of accidents. Here there seems to have been an entire absence of any precaution. The engine left the point at which it had discharged its cars, that point being from 90 to 100 feet away, and proceeded slowly along and past the highway in question without giving any warning whatever of its approach. In my opinion there was therefore evidence from which the learned Judge in the county court was justified in finding the defendants had been guilty of negligence: *Hollinger v. Canadian Pacific R.W. Co.* (1893), 20 A.R. 244, at pp. 251, 252; *Grand Trunk R.W. Co. v. McKay* (1903), 34 S.C.R. 81, at p. 101; *Lake Erie and Detroit River R.W. Co. v. Barclay* (1900), 30 S.C.R. 360; *Bonnville v. Grand Trunk R.W. Co.* (1902), 1 O.W.R. 304; *Moyer v. Grand Trunk R.W. Co.* (1903), 2 O.W.R. 83.

The defendants, however, insist that the action should have been dismissed upon the evidence of the seryant in charge of the horse. It is asserted that he blindly walked into the danger which lay in front of him without the ordinary precaution of looking or listening. In determining the weight and effect to be given to this contention the surrounding circumstances must be considered. The place was one which was traversed by an engine only two or three times a week: the approach to the track was an ascent and was so uneven that the horse was driven at a walk and the driver was engaged in holding his load on the waggon as he approached

the track. Approaching so slowly as he did he may well have expected to receive warning of the approach of an engine, and to have been able easily to draw up before it reached the crossing. I think the question of contributory negligence under these circumstances was one which could not properly have been withdrawn from a jury, and that the learned Judge who tried the case might not unjustly come to the conclusion that the driver had not been guilty of negligence which contributed to the accident. I cannot therefore see my way to interfering with the judgment, and in my opinion the appeal should be dismissed with costs.

BRITTON, J.:—The evidence clearly establishes the fact that the defendants, on the occasion when the accident happened, took no precaution to warn of danger persons who might happen to be lawfully upon the lane or street and approaching the railway crossing. No fault can be found with the finding by the learned county court Judge, who tried this case without a jury, of negligence against the defendants. The only point for serious consideration is whether or not the servant of the plaintiff, who at the time of the accident was driving the horse, was guilty of contributory negligence. Wm. Newcombe was the driver. His evidence, so far as material, is as follows: "I drove the horse in question at the time of the accident in October last. I was loading the cans at the Grand Trunk freight shed. I had to go in through the alleyway to the can shop. When I went in I saw no car moving nor engine. I looked both ways. After loading I was coming out walking on the left side of my horse, holding the cans. It was an up grade. I heard no whistle or bell. I, while loading, could have heard the whistle, but not likely could have heard the bell. As I was coming out, if a bell or whistle had been sounded I could have heard it. I had no warning at all of any kind before the horse was struck. I was going very slowly. I could not drive quickly or it would have shaken off the cans. I was holding them on. If I had been leading the horse I would have been struck myself."

On cross examination: "I did not know there was a train there at all. Sometimes there were not more than two trains

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a week, generally. They never warned me. . . . I did not see a train when I went in, and I took no means to find out. It would be ten or fifteen minutes from the time of going in till I came out. I drove out believing there was no danger. I took no means to see whether there was any danger. . . . The horse was going two miles an hour. . . . I am not at all hard of hearing. I did not look to see before the horse was struck."

Upon the undisputed facts, was the boy bound to stop his horse and go forward and look and listen before driving the horse upon the track, attempting to cross it?

I confess my inability to reconcile all the decisions upon the question of contributory negligence. There are reported cases which seem to me less strong than the present case in favour of a defendant, in which courts have held that the defence as a matter of law was made out, and that there was nothing to submit to the jury, and there are reported cases the other way.

This case is very close to the cases of *Weir v. Canadian Pacific R.W. Co.* (1888), 16 A.R. 100; *O'Hearn v. Port Arthur* (1902), 4 O.L.R. 209; and *Danger v. London Street R.W. Co.* (1899), 30 O.R. 493; but every case must be determined upon its own facts, and it is important here that Newcombe, when he went into, and "through the alley way to the can shop," looked both ways, and saw no engine or car moving, nothing likely to move. While he was loading up his vehicle he heard no whistle or bell; when he was coming out from the can shop he could have heard a whistle or bell if sounded. He was going very slowly, and holding the cans to prevent their falling. The archway was narrow; the distance between it and the track very short, and the track was not used very much. Upon these facts can more, after all, be said than that "though he acted imprudently there was some excuse for what he did." See remarks of Osler, J.A., in *Weir v. Canadian Pacific R.W. Co.*, at page 104. If there could be an excuse for what Newcombe did, then it was for the determination of the trial Judge, and he has found, although not in terms, that he was not guilty of contributory negligence. This appeal must be considered as if the Judge had found that Newcombe could not by the exercise of reasonable care have avoided the accident.

There was evidence upon which such a finding could be made. If the case had been tried by a jury it could not at the close of the evidence have been properly withdrawn from them and a nonsuit directed, and so the appeal must be dismissed, and with costs.

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[IN THE COURT OF APPEAL.]

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Nov. 14.

LANGLEY V. KAHNERT.

Sale of Goods—Property Passing—Consignor and Consignee—R.S.O. 1897 ch. 148. sec. 41—“Transfer” meaning of.

A quantity of furs were consigned by a manufacturer to a company at its risk as to burglary, fire, etc., with the right to the company to sell the same for such price and on such terms of credit or otherwise as it chose, and the company was to pay the manufacturer within twenty-four hours after the sale of any article according to a price list furnished with the goods, and it might become the owner of any article on payment of the price according to such list, with the right to the manufacturer and the company respectively to withdraw or return any of the goods, which right, from time to time, had been duly exercised. The company assigned for the benefit of creditors. The assignee claimed the furs not sold:—

Held, that the relationship between the parties was not that of vendor and purchaser, but of consignor and consignee, the property in the goods continuing in the consignor.

Held also that sec. 41 of the Bills of Sale and Chattel Mortgage Act R.S.O. 1897 ch. 148 did not apply, there not having been any sale of the goods, the word “transfer” also contained in the section being used in a limited sense, namely, in reference to a transaction in the nature of a sale.

THIS was an appeal from the judgment of Meredith, C.J.C.P., reported 7 O. L. R. 356, where, and in the judgment of this Court, the facts are stated.

On September 30th, 1904, the appeal was argued before MOSS, C.J.O., OSLER, MACLENNAN, GARROW and MACLAREN, JJ.A.

W. R. Smyth, for the appellant. The relationship which existed between Kahnert and the Simpson Company was that of vendor and purchaser, and not merely that of principal and agent. The result of the transaction was that the property in the goods passed to the Simpson Company. The learned Chief Justice properly found that the facts of this case brought it within *Ex p. White* (1871), L. R. 6 Ch. 397, affirmed in the House of Lords, 21 W.R. 465, 29 L.T.N.S. 76. He was of the opinion, however, that under that case there was no change of ownership until there was a sale by the Simpson Company to a purchaser; but the true effect of the decision is that the property passed when the goods were delivered. But, even assuming that the property did not pass until there was a sale to a purchaser, then on such sale, *eo instanti*, there was a sale to the Simpson Company. The case clearly comes within the

Bills of Sale and Chattel Mortgage Act, R. S. O. 1897, ch. 148, sec. 41. The very object of that statute was to prevent the passing, like herè, of the possession of large quantities of goods without the agreement being registered. Not only is the word "sell" used but also the word "transfer." This latter word is very wide, and includes cases even where there may not strictly be a sale: Stroud's Jud. Dic., 2nd ed., tit. "Transfer;" *Gathercole v. Smith* (1880), 17 Ch. D. 1, 7; *Copeland v. Eastern R. W. Co.* (1856), 6 E. & B. 277; Standard Dic., tit. "Transfer." The case of *Mason v. Lindsay* (1902), 4 O.L.R. 365, relied upon by the learned Chief Justice, is not an authority in favour of the defendants; but, even if it were, it is wrongly decided, and is not binding on this Court.

W. M. Douglas, K. C., for the respondent. The learned Chief Justice was quite right in holding that the relationship between Kahnert and the Simpson Company was that of principal and agent, the Simpson Company being merely sales agents for Kahnert; and, as pointed out, *Ex p. White* does not apply. This is quite apparent from what is said in the subsequent case of *Ex p. Bright* (1879), 10 Ch. D. 572. See also *Quinn v. Leatham*, [1901] A. C. 506; *Whitefield v. Bread* (1847), 16 M. & W. 262; *Re Fewcus, Ex p. Buck* (1876), 3 Ch. D. 795; *Scott v. Surnam* (1743), Willes 400. In *Ex p. White* the consignee altered the goods after they came into his possession, so that he could not have returned them. He also treated moneys received on sales as his own. He never made any return of the proceeds of any particular sale, but merely a return of the proceeds of sales generally, and there is also this distinction that Kahnert had the right at any time to withdraw any of the goods from the possession of the Simpson Company, and the Simpson Company had the corresponding right of return, and they both exercised this right. Then, as to the statute, it does not apply, as the agreement did not amount to a sale, or a transaction in the nature of a sale, and this is the meaning of the word "transfer" used in connection with sale. The agreement does not contain any provision that the passing of the absolute ownership, as distinguished from the possession, should be deferred until, for instance, certain payments are made, such for instance, as what are known as sale receipts:

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Mason v. Lindsay (1902), 4 O.L.R. 365; *Helby v. Matthews*, [1895] A.C. 471; *Bull Ropes Co. v. Adams* (1895), 65 L.J.N.S. Q.B. 114; *Wylde v. Legge* (1901), 84 L.T.N.S. 121.

November 14. The judgment of the Court was delivered by MACLAREN, J.A.:—This is an appeal by the plaintiff from the decision of the Chief Justice of the Common Pleas, who tried the case without a jury.

The action was brought by an assignee for the benefit of creditors to recover from a manufacturer of furs, goods of the value of \$1,115, which the latter had placed in the hands of the Richard Simpson Company for sale by them, and which were in their possession and not sold at the time they made an assignment to the plaintiff, under R.S.O. 1897, ch. 147. The arrangement between the defendant and the company was a verbal one, but the facts are not in dispute. They appear in admissions which were signed by counsel and in the testimony of the defendant and the president and the manager of the company. Briefly they may be stated as follows:—

The goods in question purported to be consigned by the defendant to the company, but bore no mark or label with the name or address of the defendant. The company had the right to sell the goods on any terms of credit or otherwise, or for any price that it chose, but was to pay the defendant within twenty-four hours after the sale of any article according to a price list furnished with the goods. The company might also become the owner of any article on payment to defendant of its price according to such list.

The defendant had the right to withdraw any of the goods at any time, and the company on its part had a corresponding right to return any of them. Both parties exercised this right from time to time. While the goods remained in the possession of the company they were to be at its risk as to burglary, fire, etc.

The plaintiff's first claim was that under these circumstances, as a matter of law, the goods became the property of the company. That although lists of the goods were delivered with them declaring them to be on consignment, and although they were receipted for by the company as such, yet the

transactions were, in law, sales and not consignments, and the actual relation between the parties that of vendor and purchaser, and not principal and agent, or consignor and consignee. The plaintiff's counsel at the trial admitted that it was the intention of the parties to make the transactions consignments if they could; but claimed that the nature of the arrangement prevented them from accomplishing the desired result.

Such a proposition, so manifestly contrary to the intention of the contracting parties, would appear also to be contrary to what one would naturally expect to be the effect of entering into such a contract. But it was very strongly pressed upon us that such is the law, under the authority of *Ex p. White*, L.R. 6 Ch. 397, affirmed in the House of Lords. On examining that case, however, it will be found that while it has some points in common with the present, there are very marked differences. In that case the consignee frequently spent considerable sums upon the goods in bleaching, dyeing, etc., and there was not the same right on the part of the manufacturer to take them back at any time, as in the present case. And the fundamental distinction between the two cases is that the object of the two actions was entirely different. In the *White* case the manufacturer was claiming not the goods themselves, which had been sold, but the proceeds as trust moneys. The agreement was that the sales of each month should be accounted for at the end of the month, and paid over at the end of another month, the money being meanwhile placed by the seller with his firm, and by them deposited with their banker. At the end of the second month the money was paid over to the manufacturer by the cheque of the firm. Moneys so deposited and not paid over at the time of the bankruptcy of the seller were claimed by the manufacturers from the trustees for the creditors of the bankrupt, as being trust moneys, but it was held that they were not trust moneys and that they could not be followed by the manufacturer.

In order to make that case an authority for the claim of the present plaintiff the principle there laid down would require to be very much extended. It is worthy of note that in a later case (*Ex p. Bright*, 1 Ch. D. 566), Lord Justice James,

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who gave the principal judgment in the *White case*, said that that was a judgment upon the particular facts of the case, and did not lay down any new principle.

The arrangement between the defendant and the company bears more analogy to the contract known as "sale or return," treated of in sec. 18, r. 4, of the Imperial Sale of Goods Act, 1893. There the property does not pass although the person who has entrusted the goods to another cannot demand their return, his only remedy being to sue for their price or value: *Kirkham v. Attenborough*, [1897] 1 Q.B. 201, *per* Brett, M.R., at p. 203.

A fortiori in the present case when the consignor retained the right to withdraw the goods or any of them at any time, the property would remain in him. The property did not pass on the making of the contract, nor on the delivery of the goods. If the company made a sale, the effect of that act was two-fold: (1) to pass the property from defendant to the company; and (2) contemporaneously to pass the property from the company to the purchaser. If the company itself became the purchaser the property would pass to it on its payment of the price to the defendant, but not until then.

The assignment from the company to the plaintiff vested in him under sec. 5 of R.S.O., ch. 147: "All the real and personal estate, rights, property, credits and effects, whether vested or contingent, belonging at the time of the assignment to the assignor," with the exceptions specified in the Act. The only rights the company had were to sell the goods and pay over to the defendant the price according to the list, or to pay him the price and thereby become the owner of them itself. Both of these rights were subject to the right of the defendant to withdraw the goods before such sale or the exercise of such option to purchase. Neither the company nor its assignee exercised either of these rights before the defendant's withdrawal, nor is either of such rights claimed in the present action.

No case exactly like the present, either in this country or in England, was cited to us. The only one which I have been able to find that appears to be precisely in point is a Scotch case of *Macdonald v. Westren* (1888), 15 Rettie (4th series), 988. There the trustee in bankruptcy was held not to be entitled to

the possession of goods held by a retail dealer at the time of his bankruptcy under circumstances similar to those of the present case.

On principle and on the facts of this case it seems to me to be perfectly clear that, apart from the effect of our statute which remains to be considered, the property in the goods in question remained in the defendant, and did not on the assignment by the company pass to the plaintiff.

It is further claimed on behalf of the plaintiff that the present case falls within the provisions of sec. 41 of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1897, ch. 148, which enacts that, "In case of an agreement for the sale or transfer of merchandize of any kind to a trader or other person for the purpose of resale by him in the course of business, the possession to pass to such trader or other person but not the absolute ownership until certain payments are made or other considerations satisfied, any such provision as to ownership shall as against creditors, mortgagees or purchasers be void, and the sale and transfer shall be deemed to have been absolute," unless there has been compliance with the conditions of the subsequent clauses of the section as to the contract being in writing, and a copy filed with the clerk of the county court, etc. If the transactions in question are sales or transfers within the meaning of this section then the plaintiff must succeed, as it is not claimed that the provisions of the latter part of the section have been complied with.

It cannot be said that there was a "sale" of these goods to the company, for the company never in any sense became the purchaser of the goods. But it is said that there was a "transfer" within the meaning of the Act. No doubt there was a transfer of possession for the purpose of a sale by the company, but is that enough? This exists also in every case where goods are placed by the owner in the hands of a factor or agent, and yet no one will pretend that such a case comes within the provisions of this section.

It is evident that the word "transfer" is not used here in its widest sense. It seems to be a proper case for the application of the maxim or rule of *noscitur a sociis*. If it did not mean a transfer partaking of the nature of a sale, the use of

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the word "resale" would not have been appropriate, and would not have been made applicable to both sale and transfer. Again, the provision that the absolute ownership is not to pass, seems to contemplate an agreement by which a qualified or conditional ownership does pass, or in which some of the material elements which go to make up ownership are intended to be transferred. A close examination of the facts of the present contract shews how entirely these elements are lacking.

In my opinion the statute cannot be made applicable to the transaction in question without straining its meaning beyond what the language will properly bear.

The appeal must be dismissed.

OSLER, J.A., took no part in the judgment, having been absent on circuit.

G. F. H.

[IN THE COURT OF APPEAL.]

METALLIC ROOFING CO. OF CANADA v. LOCAL UNION NO. 30,
 AMALGAMATED SHEET METAL WORKERS' INTERNATIONAL
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Jan. 23.

Parties—Foreign Unincorporated Association—Local Branch—Right to Sue and Serve with Process—Representative Action for Tort—Rule 200—Selection of Representatives.

Held, affirming the decision of a Divisional Court, 5 O.L.R. 424, that the defendant associations, being trade unions not registered under the Trade Unions Act, one being a general association of the metal workers of the United States and Canada, and the other a local union or branch of the general association, were not corporations nor quasi-corporations nor partnerships, and were not capable of being sued and served with process as such in the ordinary way.

Held, also, varying the decision of MACMAHON, J., that both associations could be sued in respect of wrongs committed within the jurisdiction, in a representative action, under Rule 200.

Temperton v. Russell, [1893] 1 Q.B. 435, not followed, in view of the remarks in *Duke of Bedford v. Ellis*, [1901] A.C. 1, and *Taff Vale R. W. Co. v. Amalgamated Society of Railway Servants*, *ib.* 426.

Semble, that a wider selection of representatives of the general association should have been made, instead of confining it to the first vice-president; but upon that point the defendants had concluded themselves by a consent.

APPEAL by the plaintiffs from the order of a Divisional Court (Meredith, C.J.C.P., and Maclaren, J.A.), reported 5 O.L.R. 424, allowing appeals from orders in Chambers, and setting aside service of the writ of summons on the Amalgamated Sheet Metal Workers' International Association, added as defendants by an order in Chambers not appealed against, by serving the defendant Kennedy, 1st vice-president of the association, for the association. The Divisional Court held that the association, not being a corporation, individual, partnership, nor a quasi-corporate body, could not be so served. The plaintiffs also appealed from an order of MacMahon, J., refusing to allow representation of the association by the individual defendants, and the defendants cross-appealed from the same order in so far as it allowed representation of the defendants the Local Union No. 30 by individual defendants.

The appeals and cross-appeal were heard by Moss, C.J.O., OSLER, MACLENNAN, GARROW, J.J.A., and TEETZEL, J., on the 17th and 18th February, 1904.

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W. N. Tilley, for the plaintiffs. The Divisional Court set aside the service of the writ, on the ground that the international association was not a body corporate or a partnership, and that the proper course for the plaintiffs to pursue was to obtain an order for representation. The defendants contended, however, that such an order could not be made in an action for a tort: *Temperton v. Russell*, [1893] 1 Q. B. 435. But the parties agreed to an order that the individual defendants should, for the purposes of the action, represent all other persons constituting the local union and the international association, and a consent order accordingly was made on the 6th March, 1903, containing a reservation as to the power of the Court to make such an order. The effect of this was, that the defendants conceded that, if representation could be ordered in such an action as this, the individual defendants sufficiently represented all other persons constituting both the local union and the association, and the only question left open was as to the power of the Court to make the order. By the same order the style of cause was amended so as to shew expressly that the individual defendants represented all other persons constituting both the local union and the association, and the action has since proceeded on that basis. The order of MacMahon, J., now appealed against, confirms the previous consent order for representation as to the local union, but declares that the Court has no power to order representation as to the association. The result is that the plaintiffs cannot proceed with the action as against the association unless the order of the Divisional Court or the latter part of the order of MacMahon, J., is set aside. The association was not originally a party, but was added by an order in Chambers dated the 24th December, 1902, upon notice to the defendant Kennedy for the association, and the association was represented by counsel on the motion and opposed the same, but made no objection to the mode of service. This order has not been appealed against by the association, and the only question is as to the mode of serving the writ. The association is estopped, by appearing pursuant to the notice of motion served upon Kennedy, from denying the regularity of the service of the writ. The association is not in fact a foreign body; it carries on its business in Canada. It

is estopped from denying its corporate capacity. But, if not incorporated, if it has legal recognition or is registered, it can be sued by its union name: *Taff Vale R.W. Co. v. Amalgamated Society of Railway Servants*, [1901] 1 K.B. 170, [1901] A.C. 426; *Duke of Bedford v. Ellis*, *ib.* 1. The association can be served under Rule 159, applying to service on corporations; or under Rules 222 and 223, applying to partnerships: *Beaumont v. Meredith* (1814), 3 Ves. & B. 180; *Lloyd v. Loaring* (1802), 6 Ves. 773; or under Rule 231, applying to service on a person carrying on business under a name not his own; or under Rule 3, relating to matters to be regulated by analogy to these Rules; or the Court can make an order for substitutional service under Rule 146. If the association can be sued, Kennedy is the proper person to be served. If the association cannot be sued as such, the plaintiffs must sue the members, and are entitled to a representation order under Rule 200: *Smith v. Doyle* (1879), 4 A.R. 471; *Wood v. McCarthy*, [1893] 1 Q.B. 775; *Gillies v. McConochie* (1882), 18 C.L.J. 179. There is no reason why Rule 200 should not apply to an action in tort. *Temperton v. Russell*, [1893] 1 Q.B. 435, has been explained in *Duke of Bedford v. Ellis*, [1901] A.C. 1, and *Taff Vale R.W. Co. v. Amalgamated Society of Railway Servants*, *ib.* 426, and does not apply here. *Small v. Hyttenrauch* (1903), 6 O.L.R. 388, is really a decision in favour of representation of a general association.

J. G. O'Donoghue, for the defendants. The international association is not concerned in the dispute between the plaintiffs and their workmen. The onus is upon the plaintiffs to establish that the local union and the association are incorporated or registered, and they must fail: *Murphy v. Phoenix Bridge Co.* (1899), 18 P.R. 495; *Golding v. Order of Sacrées Cœurs* (1892), 67 L.T.N.S. 605. The status of trade unions, apart from incorporation or registration, is set forth in the *Taff Vale* case, in the judgment of the Court of Appeal, [1901] 1 K.B. 170. The position of the association is analogous to that of a club, and a club cannot be served with process: *Grossman v. Granville Club* (1884), 28 Sol. J. 513. If it is not an entity known to the law, service cannot be effected on some one for it: *Sloman v. Governor of New Zealand* (1876), 1 C.P.D. 563,

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565. Even if the association were a corporation, it would not come within Rule 159, for no business is being carried on in Ontario for it: *Wilson v. Detroit and Milwaukee R.W. Co.* (1860), 3 P.R. 37; *Badcock v. Cumberland Gap Park Co.*, [1893] 1 Ch. 362. The other Rules cited are similarly inapplicable. The rule as to substitutional service applies only where there is jurisdiction to serve in the first instance: *Worcester City and County Banking Co. v. Firbank*, [1894] 1 Q.B. 784; *Sloman v. Governor of New Zealand*, 1 C.P.D. at p. 565. And there is no evasion of service here: *Robertson v. Mero* (1883), 9 P.R. 570. This association could not be registered, and could not be sued at common law: *Chalmers-Hunt on Law of Trade Unions* (1902), p. 197; *Rigby v. Connol* (1880), 14 Ch. D. 482, 491; *Chamberlain's Wharf, Limited v. Smith*, [1900] 2 Ch. 605; *In re Amos*, [1891] 3 Ch. 159, 164; *Farrer v. Close* (1869), L.R. 4 Q.B. 602, 612; *Nightingale v. Barney* (1853), 4 Greene (Iowa) 106. If the association were registered, it might be sued; and that is what the *Taff Vale* case decides; all the rest is *obiter*. Where a union is concerned, the action must be against all the members: *O'Connell v. Lamb* (1895), 63 Ill. App. 652. Upon the question of actual service on a body of this kind, *State v. Staed* (1895), 64 Mo. App. 28, is exactly in point. To shew a partnership, something in the nature of buying and selling must be established: *Grant v. Anderson*, [1892] 1 Q.B. 108; *Lindley on Partnership*, 6th ed., p. 13; *Wise v. Perpetual Trustee Co.*, [1903] A.C. 139, at p. 149; *Baillie v. Goodwin* (1886), 33 Ch. D. 604. Carrying on a paper is not necessarily a business: *Linaker v. Pilcher* (1901), 84 L.T. 421. If the Court has not jurisdiction, it cannot give itself jurisdiction by analogy. An unincorporated body cannot be sued at all: *Kingston v. Salvation Army* (1903-4), 6 O.L.R. 406, 7 O.L.R. 681; *Small v. Hyttenrauch*, 6 O.L.R. 388. In an action of tort there can be no representation: *Temperton v. Russell*, [1893] 1 Q.B. 435. The English Rule is wider than ours, as it speaks of "persons," while ours mentions "parties." There cannot be said to be a common interest in an action of tort: *Chester v. Halliard* (1882), 36 N.J. Eq. 313. The Court has no power to allow representation of those not subject to its jurisdiction. The officers are officers of the union, not of the

members: Pollock on Torts, 3rd ed., p. 110. There is no agency in tort: *Ontario Industrial Loan Co. v. Lindsey* (1883), 4 O.R. 473, 487. *Temperton v. Russell* is not overruled by *Duke of Bedford v. Ellis*, [1901] A.C. 1, and is approved in *Wood v. McCarthy*, [1893] 1 Q.B. 775. See also *Murray v. Clapp* (1897), 33 C.L.J. 771. *Temperton v. Russell* is a decision of the Court of Appeal, and should be followed: *Trimble v. Hill* (1879), 5 App. Cas. 342; *Paradis v. The Queen* (1887), 1 Ex. C.R. (Can.) 191; *Hollender v. Ffoulkes* (1894), 26 O.R. 61.

Tilley, in reply.

January 23. The judgment of the Court was delivered by OSLER, J.A.:—This action was originally brought against Local Union No. 30, Amalgamated Sheet Metal Workers' International Association (Local Union No. 30 A.I.A.), and afterwards by amendment against the Amalgamated Sheet Metal Workers' International Association (A.I.A.), and the individual defendants, both on their own behalf and as representing the other defendants. The action is in the nature of an action of tort for conspiring to injure the plaintiffs in their business by calling out their workmen on strikes, and in other ways, and for the publication of libellous statements concerning the plaintiffs in respect of their dealings with their workmen, etc., etc.

The wrongs complained of were committed within the jurisdiction.

Local Union No. 30 A.I.A. is an associated body of workmen, of which the individual defendants are officers and managers. It is a branch or member of the A.I.A., which is composed of all similar unions in Canada and the United States, and whose affairs are managed by an executive board of officers having titles corresponding to the nature of their duties in the association, and each of whom is also an officer of some local union. The defendant Kennedy was, at the time of the service upon him of the amended writ, president of Local Union No. 30 A.I.A., and also 1st vice-president of the A.I.A.

An outline of the proceedings in the case up to the present stage may be useful.

On the 31st December, 1902, an order was made in

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Chambers, on hearing counsel for the defendants the Local Union No. 30 A.I.A., and for Kennedy, Annable, Gow, and the A.I.A., giving the plaintiffs leave to add these persons and the A.I.A. as defendants in the action, and to amend as they might be advised.

This order has not been appealed from.

Thereafter the defendant Kennedy was served with the writ of summons as agent and on behalf of the A.I.A.

On the 19th February, 1903, an application of the A.I.A. to set aside the service of the writ upon the defendant Kennedy was dismissed by the Master in Chambers, and on the same day his order was affirmed by Meredith, J.

The A.I.A. then appealed to a Divisional Court, on the ground that the Consolidated Rules contained no provision for allowing service to be made upon them by serving the defendant Kennedy, and that service on him was irregular, as, not being an incorporated body or partnership or an individual, they could not be served in that manner.

On the 3rd March, 1903, their appeal was allowed, and the orders of the Master in Chambers and Meredith, J., set aside, without costs (5 O.L.R. 427).

In the judgment of the Court it was said that it was not intended to suggest that relief might not be obtained by suing the A. I. A. in a representative action; and on the 6th March, 1903, an order was made by Boyd, C., upon the application of the plaintiffs, and upon reading the consent of the defendants' solicitor filed, that the individual defendants José, Russell, Cox, Brake, Chapman, Kennedy, Annable, and Gow, should for the purposes of the action, besides representing themselves, represent, and they were thereby authorized to defend the action on behalf and for the benefit of, all other persons constituting Local Union No. 30 A. I. A. and all other persons constituting the A.I.A., and that all such other persons should be bound by the proceedings in the action. It was further ordered that, notwithstanding this order, the defendants should be at liberty to raise at the trial the question whether the Court had any jurisdiction to make such order in an action in which the issues involved were those raised by the pleadings.

By the same order the style of cause was amended so as to read as it now appears.

Thereafter the action was proceeded with, and evidence taken on commission in the United States for the purpose of the trial.

On the 21st September, 1903, the action came on for trial, but it was held by the learned trial Judge that it was not and would not be ripe for trial until the question of the right to sue in a representative action had been decided. This the learned Chief Justice declined to determine at the trial, and the case was struck off the list, and the trial postponed until that could be done.

The matter was then brought before MacMahon, J., for that purpose, and on the 5th October, 1903, an order was made by him, reciting the order of Boyd, C., of the 6th March, and the facts mentioned in the last paragraph, and ordering that the individual defendants should for the purposes of the action, besides representing themselves, represent, and they were thereby authorized to defend the action on behalf of and for the benefit of, all other persons constituting Local Union No. 30 A.I.A., and that all such other persons should be bound by the judgment and proceedings in the action. It was further declared that the Court had no power to make an order that the individual defendants should represent all persons constituting the A.I.A.

On the 10th October, 1903, an order was made by a Judge of the Court of Appeal in Chambers that the plaintiffs should be at liberty to appeal to that Court from the order of the Divisional Court of the 3rd March, as part of their appeal from the order of MacMahon, J., of the 5th October, and the time for appealing was also extended.

In holding that the individual defendants were properly qualified to represent Local Union No. 30 A.I.A., MacMahon, J., followed a decision of a Divisional Court in *Small v. Hyttenrauch*, 6 O. L. R. 388, but he held that these defendants were not qualified to represent the larger or parent body, the A.I.A., a foreign body, with its headquarters in the State of Kansas, and under whose jurisdiction all the local unions in the United States and Canada were placed.

The present appeal is from the order of the Divisional Court of the 3rd March, 1903, and from so much of the order

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of MacMahon, J., as declares that the Court had no jurisdiction to make any order respecting the representation of the A.I.A.

The questions raised by the appeal are: (1) whether the Local Union No. 30 A.I.A. and the A.I.A. are corporations or quasi-corporations or partnerships and capable of being sued and served with process as such in the ordinary way; and, if not, (2) whether they or either of them can be sued in a representative action for such causes of action as are disclosed in the statement of claim.

It is, I think, quite sufficiently proved for the purpose of the present proceeding that neither the Local Union No. 30 A.I.A., nor the A.I.A., is a corporate body. Nor does either of them appear to be registered anywhere by the name of their association so as to constitute them a quasi-corporate body such as was sued in the *Taff Vale* case, [1901] A.C. 426. Nor do I see that either of these bodies can be regarded as a partnership. They are simply voluntary associations united for the purpose of promoting the interest of the members in relation to their employment and against their employers—trade unions, in short—combinations of the character described in sec. 2 of the Trade Unions Act, R.S.C. 1886, ch. 131, though of course not trade unions within the Act, because not registered as the Act requires. They are not in any sense associations for the purpose of trade, or of deriving gain or profit from their transactions. The position of their members, as has been more than once remarked, is more like that of the members of an unincorporated club than anything else. Neither of these associations being an entity known to the law, and no provision having been made by statute or rule of court to meet the case, it follows that they cannot be effectively sued by their adopted name nor served with process merely by serving one of their members, no matter how exalted the position or high-sounding the title he bears in the association.

I agree with what has been said by Meredith, C.J., on this point: 5 O. L. R. 424, 427. The judgment of the Divisional Court must, therefore, be affirmed.

The remaining question is, whether bodies of this nature can be sued in tort in a representative action, under the large words of Con. Rule 200. This was the question which was

reserved by the Chancellor's order of the 6th March to be raised at the trial, but which, in the circumstances above mentioned, was afterwards brought before and disposed of by MacMahon, J.

It was stoutly contended that Rule 200 did not apply to an action for a tort, and that the plaintiffs were practically without remedy for the injuries alleged except by a (probably) useless action against the individual offenders. *Temperton v. Russell*, [1893] 1 Q.B. 435, was strongly relied on in support of this view, and if that case stood alone we should probably feel ourselves bound to follow it. Its authority, however, as laying down any rule of general application, has been impugned and weakened, if not destroyed, by the later cases of *Duke of Bedford v. Ellis*, [1901] A.C. 1, and *Taff Vale R.W. Co. v. Amalgamated Society of Railway Servants*, *ib.* 426. It has been explained as a case in which the only point decided was that the persons sued were not fairly representative of the union or association. Lord Macnaghten, indeed, speaks of it as "an absurd case" in that respect.

In the *Taff Vale* case it was held that a trade union, registered under the Trade Union Acts of 1871 and 1876, might be sued in its registered name. But the larger question is very fully dealt with. Lord Macnaghten, after pointing out that bodies of this nature, registered or unregistered, are not above the law, said that the question of how they should be sued was one of form, and adds (p. 438): "I have no doubt whatever that a trade union, whether registered or unregistered, may be sued in a representative action if the parties selected as defendants are persons who, from their position, may be taken fairly to represent the body;" and he repudiates the contention put forward by the defendants' counsel that, if a wrong was committed by a body of persons acting in concert who were too numerous to be made defendants, the person injured would be without remedy unless he could fasten upon the individuals who with their own hands were actually doing the wrong. That, he says, would "be a reduction to absurdity." "I should be sorry to think," he adds, "that the law was so powerless; and therefore it seems to me that there would be no difficulty in suing a trade union in a proper case if it be sued in a

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representative action by persons who fairly and properly represent it."

And Lord Lindley, who must be said to speak with high authority on such a subject, says (p. 443): "The principle on which the rule"—that is, the rule as to representation—"is based forbids its restriction to cases for which an exact precedent can be found in the reports. The principle is as applicable to new cases as to old, and ought to be applied to the exigencies of modern life as occasion requires. The rule itself has been embodied in and made applicable to the various Divisions of the High Court by the Judicature Act, 1873, secs. 16 and 23-25, and Order 16, r. 9"—which corresponds with our Rule 200—"and the unfortunate observations made on that rule in *Temperton v. Russell* have been happily corrected in this House in *Duke of Bedford v. Ellis* and in the course of the argument in the present case." And he adds: "I have myself no doubt whatever that if the trade union could not be sued in this case in its registered name, some of its members (namely, its executive committee) could be sued on behalf of themselves and the other members of the society, and an injunction and judgment for damages could be obtained in a proper case in an action so framed." And at p. 445: "The use of the name in legal proceedings imposes no duties and alters no rights: it is only a more convenient mode of proceeding than that which would have to be adopted if the name could not be used."

I think we may well adopt the views expressed in the passages I have quoted. It would be a most deplorable result if a plaintiff should be found to be practically without remedy in a case of this kind—I of course do not speak of the merits of this particular litigation—as he would be if he were unable to proceed in a representative action. As was said in the case cited, we have not to consider how the judgment can be enforced; we have only to determine that the action is properly framed, and therefore, as regards Local Union No. 30 A.I.A., the order of my brother MacMahon should be affirmed.

As to the A. I. A., I can see no reason why, in the circumstances, a similar order should not have been made. If they were parties to the wrongs of which the plaintiffs complain, those wrongs were committed within the jurisdiction, and the

only question would be, who should be made defendants as representing their body. If the motion were before us now for the first time, it might well be said that a wider selection should have been made, and that representation should not have been confined to their 1st vice-president, but I think it must have been overlooked that these defendants were content with that representation, and consented to it, and, had the point been ruled at the trial, they must have been bound by it. The Chancellor's order of the 6th March has not been interfered with. Nothing was changed but the forum of decision of the question reserved, and the case came before MacMahon, J., just as it came before, and might have been disposed of by, the Judge at the trial. The only question reserved to be decided was, whether the Court had any jurisdiction to make the order in such an action as this, and, as that ought, in my opinion, to have been decided adversely to the respondents, it follows that they must be held to their consent as to the sufficiency of the representation. I cannot see that the fact, if it be a fact, that they are a foreign body, seeing that they have many branches and an executive officer in this country, can affect the question save as regards the extent to which it might have been thought proper to direct representation if that had not been consented to.

I am, therefore, of opinion that the order of my brother MacMahon should be varied in this respect, and representation ordered as provided by the consent.

The appeal from the order of the Divisional Court will, therefore, be dismissed with costs; that from the order of MacMahon, J., allowed with costs; and the defendants' cross-appeal will be dismissed with costs.

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[IN CHAMBERS.]

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WHITESELL ET AL. V. REECE.

Dec. 9.

Costs—Scale of—Damages at Trial, \$400—Remainderman—Variation of Judgment to Present Value, \$180—County Court Jurisdiction.

In an action by remaindermen against a life tenant of a farm and the purchaser of the timber for selling the latter, the trial Judge found for the plaintiff and assessed the damages at \$400, to be paid into court, and paid out to the plaintiffs on the death of the life tenant, who was to have the interest in the meantime. On an appeal to a Divisional Court the judgment was affirmed as to the amount of damages, but varied by directing that instead of the \$400 being paid into court and the life tenant receiving the interest, the present value of the plaintiffs' interest should be paid to them fixed at \$180 :—

Held, that although the formal judgment adjudged that the trial judgment "is hereby varied by reducing the sum payable by defendant to the plaintiffs for damages from \$400 to \$180, which latter sum shall be paid forthwith by defendants to the plaintiffs," the plaintiffs were entitled to costs on the High Court scale.

Held, also, that the effect of a defence by the life tenant, that payments had been made by her on an existing mortgage to the amount of \$1,600, and claiming that she should be subrogated to the mortgagee's rights; and by the purchaser, that he had bought the timber for value without notice raised the question of title to an interest in land to a greater value than \$200 and the county court had no jurisdiction.

THIS was an appeal from a certificate of taxation of the plaintiffs' costs by the taxing officer at St. Thomas.

The appeal was argued in Chambers on the 6th December 1904, before TEETZEL, J.

W. J. Tremear, for the appeal.

C. A. Moss, contra.

December 9. TEETZEL, J.:—The plaintiffs are owners of the remainder in a farm valued at \$1,500, and the defendant Reece is life tenant of the same, and the defendant Payne is a purchaser from her of timber on the farm.

The action was for an injunction and damages for cutting and removing the timber.

The trial judge found for plaintiffs and assessed the damages at \$400, to be paid into court to be paid out to the plaintiffs on death of defendant Reece, she to have the interest in the meantime.

On the appeal to the Divisional Court, STREET, J., in delivering the judgment (5 O.L.R. 352, at page 356) says: "The

amount found payable in respect of the damage is not, in my opinion, excessive.

We think, however, that it will probably be in the interests of all parties that, instead of payment into court of the sum of \$400, as directed by the judgment under appeal, to remain there during the life of the defendant Reece, she receiving the interest meantime, she should at once pay to the plaintiffs the present value of that sum, which we calculate at \$180, and we vary the judgment to that extent only."

Subject to this variation the appeal was dismissed with costs.

The formal judgment does not recite that the Divisional Court did not interfere with the assessment of damages by the trial Judge for injury to the plaintiffs' remainder in the farm, nor that the provision for payment of the same into Court only was modified, but proceeds to adjudge that the trial judgment is "hereby varied by reducing the sum payable by defendants to plaintiffs for damages from \$400 to \$180, which latter sum shall be paid forthwith by defendants to the plaintiffs."

The plaintiffs' costs were taxed on the High Court scale, and defendants contend in appeal that Rule 1132 applies, and that on the judgment as entered the plaintiffs are only entitled to county court costs with set off by the defendants of High Court costs.

I think that notwithstanding the judgment as drawn up only awards plaintiffs \$180, it is quite clear in the light of the oral judgment delivered by the Court, that the subject matter involved was the whole \$400, and therefore that the action would not have been maintainable in the county court under sub-sec. 13 of sec. 23 of the County Courts Act.

I am also of opinion that the county court would have no jurisdiction by reason of the statement of defence, in paragraph 4 of which the defendants allege that the lands were subject to a mortgage under which \$200 per annum were payable to one Jane Scealey during her life, and that the defendant Reece has paid in all upon the said mortgage \$1,600 to the said Jane Scealey, and "the defendant claims to be entitled to be subrogated to the rights of the said Jane Scealey and her trustees in respect and to the extent of the amount so paid"; and in paragraph 10 of the defence, the defendant Payne says, "that he is the *bonâ*

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vide purchaser for value of the timber bought by him with no notice of the plaintiffs' adverse claim."

I think that the effect of these defences is to raise the question of title to an interest in land of a greater value than \$200, and therefore the action would not be maintainable in the county court by virtue of sub-sec. 1 of sec. 22 of the Act, R.S.O., 1897, ch. 55.

In view of the above, it is not necessary for me to deal with the other objection raised by Mr. Moss under sub-sec. 8 of sec. 23.

The appeal must be dismissed with costs.

G. A. B.

[DIVISIONAL COURT.]

HATELY V. ELLIOTT.

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Feb. 10.

Contract—Illegality—Unduly Lessening Competition—Trade Association—Criminal Code s. 520 (d)—Cheque—Conditional Payment—Bills of Exchange Act.

All the importers of coal in a certain town combined themselves into an association and bound themselves not to sell below fixed prices, and that any member who did so should become liable to the association for \$1 for every ton of coal so sold :—

Held, that the association was an illegal one, being a combination, conspiracy, or agreement "to unduly prevent or lessen competition in the . . . purchase, barter, sale, or supply of an article or commodity which might be the subject of trade or commerce," within the meaning of sec. 520 (d) of the Criminal Code; and the plaintiff, acting as agent of the association, could not recover on a cheque given by a member of the association in pursuance of one of the articles of the association.

Semble, that evidence is necessary in such a case to shew that competition in the sale of the articles concerned has, as a fact, been unduly prevented.

The cheque in question was marked "cheque conditional deposit," being intended, as the drawer, a member of the association, explained, to be conditional on his obtaining a certain contract :—

Held, that it was not an unconditional order to pay, and therefore not a cheque within the requirements of secs. 3 and 72 of the Bills of Exchange Act, 53 Vict. ch. 33, secs. 3, 72 (D.)

THIS was an appeal by the defendant from the judgment of the Judge of the county court of the county of Brant, refusing a new trial in an action tried in the first division court of that county, wherein he directed judgment be entered for the plaintiff for the sum of \$200 and costs.

The action was brought upon a cheque given under the circumstances mentioned in the judgment of this Court; and the appeal was argued on October 8th, 1903, before MEREDITH, C.J., C.P., and MACMAHON and TEETZEL, JJ.

W. S. Brewster, K.C., for the defendant, contended that the document sued on was not a negotiable cheque within the meaning of sec. 72 of the Bills of Exchange Act, 53 Vict. ch. 33 (D.), not being an unconditional order to pay, as required by sec. 3 of that Act; that it was really a conditional contract; and the plaintiff could not sue on the consideration, there being no privity between him and the defendant; and that the association, under the articles of which the document was given, was an illegal one: Crankshaw's Criminal Code, 2nd ed., p. 568;

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Criminal Code, 55-56 Vict. ch. 29, sec. 520 (D.), as amended by 63-64 Vict. c. 46.

E. Sweet, for the plaintiff, contended that the word "conditional" did not affect the cheque: *Jury v. Barker* (1858), E. B. & E. 459; *Kirkwood v. Carroll*, [1903] 1 K.B. 531; and that the association was not an illegal one, nor was that the question, but only whether the particular transaction was illegal: *Stevenson v. Boyd* (1897), 5 B.C. 626; *Jones v. North* (1875), L.R. 19 Eq. 426; Amer. & Eng. Encyc. of Law, 2nd ed., vol. 15, p. 953.

Brewster, in reply, referred to *Santa Clara Valley Mill & Lumber Co. v. Hayes* (1888), 76 Cal. 387; *Atcheson v. Mallon* (1870), 43 N.Y. 147.

February 10:—The judgment of the Court was delivered by MACMAHON, J.:—Appeal by the defendant from the judgment of the Judge of the county of Brant refusing a new trial in an action tried in the first division court of that county, wherein he directed that judgment be entered for the plaintiff for the sum of \$200 and costs.

The defendant was a member of "The Brantford Coal Importers' Association," formed in July, 1899, of which the plaintiff (who is not a member) was appointed secretary-treasurer. The association was not incorporated, but there was a constitution framed and rules passed by which the members were bound.

Article I. of the constitution provides that the association shall be composed of such dealers as are importers of coal, who shall have been elected and signed the constitution and by-laws.

Article VI. provides for holding meetings of the association at which all matters affecting the trade may be voted upon and the decision of the majority is to be binding on the whole.

By Article VIII. provision is made for investigating any charge of violation of the rules, etc., by a member of the association, and if "the charge be sustained the association shall take such steps as may be considered necessary to carry out the purpose for which the association was formed."

By sec. 2 of the by-laws, "Prices of coal as fixed by the

association can, under no circumstances, be deviated from or altered, except by authority of a subsequent meeting.

3. Any member of the association who shall sell coal at less than the prices fixed, or in violation of the rules and regulations made by the association for the sale of coal, shall appear before the association, and an investigation held in accordance with the provisions of Article VIII. of the constitution.

4. Any member of this association supplying coal to a dealer not a member, can do so only on condition of the said dealer agreeing to sell for the same price and under the same conditions as the members of the association; and any violations of the price or the rules of this association by the said dealer to be followed by a stoppage of the supply, which shall not again be granted, directly or indirectly by any other member without special authority from the association.

6. Municipal and government contracts for coal may be tendered for at special rates, but only on such conditions as may be agreed upon at a meeting of the association.

11. In making contracts with wood dealers for supply of coal, the agreement must distinctly state that the price is given on the understanding that the retail price agreed upon from time to time must be maintained.

20. Any member of this association, who, after this date, may sell coal at a price less than that fixed by this association shall pay to this association the sum of one dollar for each and every ton of coal so sold. The decision of the secretary, after investigation, to be final."

In the judgment delivered by the learned county court Judge, he summarizes the evidence as to the methods of the association thus: "The association at its meetings fixed the minimum price of coal among its members for the city and of selling contracts for the supply of coal to public institutions by auction amongst its members. In the latter case they first fixed the minimum price at which a tender could be put in, and the contract was then put up among the members at auction and sold to the highest bidder, the unsuccessful bidders being permitted to tender for the contract but not at as low a figure as the purchaser. The proceeds of the sale of the contract

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were then placed in the hands of a third party, the plaintiff, to be distributed among the members of the association in equal shares.

Among other contracts thus put up at auction among the members of the association was one for the public schools of the city and the defendant was declared the purchaser thereof at the sum of \$212.

The defendant was awarded the contract by the school board and was paid the contract price as fixed by the association.

On June 19th, 1901, defendant wrote the plaintiff saying: "I enclose you cheque for the sum of two hundred and twelve dollars (\$212), payable to your order, on the following conditions: 'That the contract for the city schools is to be awarded to me, and the same commenced and binding, tenders being received on the 20th day of the current month. I will notify you when the same is effected, when you will be at liberty to cash the cheque, and divide as arranged for.' . . .

My cheque will be payable at the bank, on the conditions mentioned above, of which I will notify you."

He wrote again on July 29th, 1901, stating that although the tenders for coal required by the school board were received on May 20th, the contract was not awarded until June, and in the meantime coal had gone up ten cents a ton, and he thought he was entitled to an allowance of ten cents a ton on two hundred tons. The association having declined to make the allowance, the defendant notified the Bank of Commerce, on which the cheque was drawn, not to pay.

The plaintiff then sued on the cheque abandoning the excess over \$200.

The principal grounds of defence relied upon were:

- (1) That the cheque was given conditionally;
- (2) That the Brantford Coal Importers' Association was an organization coming within sec. 520 of the Criminal Code, 55-56 Vict. ch. 29 (D.), and that the transactions out of which the alleged cause of action arose were illegal, and the plaintiff could not recover.

As to the first defence raised. A cheque is defined by sec. 72 of the Bills of Exchange Act, 53 Vict. ch. 33 (D.), as "a bill of exchange drawn on a bank payable on demand." And sec. 3 defines

a bill of exchange as "an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay, on demand or at a fixed or determinable time, a sum certain in money to or to the order of a specified person, or to bearer."

Counsel for the plaintiff contended that the words, "cheque conditional deposit," written on the face of the instrument were not such qualifying words as made it conditional: and in support of his contention cited, *Jury v. Barker*, E. B. & E. 459, where the words written on a promissory note were: "as per memorandum of agreement;" *Kirkwood v. Carroll*, [1903] 1 K.B. 531, where plaintiff was the holder of a document described as a joint and several promissory note which contained the following clause: "No time given to or security taken from or composition or arrangement entered into with either party hereto shall prejudice the rights of the holder to proceed against any other party;" and *Taylor v. Currie* (1871), 109 Mass. 36, where a promissory note given to an assurance company had written on its face: "On policy No. 33,386." The language of Chapman, C.J., in delivering the judgment of the Supreme Court of Massachusetts in the last case applies to all the cases cited. He said: "The words quoted do not express any contingency as to the payment of the notes, or refer to any fund out of which they are to be paid. . . . Such a reference may be for mere convenience, or for any other reason, but it cannot be interpreted as a modification of the promise."

The instrument in question here, however, had "cheque conditional" written on its face, and no bank would pay on presentation with these qualifying words written on it. A document which in other respects is a cheque, but which directs payment of a sum of money "conditionally" cannot be transformed into an "unconditional order to pay" at the will of the drawee.

At the trial, the plaintiff was a witness on his own behalf, and produced the constitution and by-laws of the association, and gave evidence as to the sale by auction to the defendant of the public school contract, and his letter enclosing cheque, etc.

In his written judgment, the trial Judge says that on the evidence he would not be justified in finding that the operations

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of the association were such as to unduly lessen competition, or otherwise so as to bring its members within the provisions of sec. 520 of the code.

What constitutes a criminal offence by sec. 520, sub-clause (d) of the code is a combination, conspiracy or agreement, "to unduly prevent, limit, or lessen competition in the . . . purchase, barter, sale, or supply" of any article or commodity which may be the subject of trade or commerce.

Whether or not the eight or ten persons and firms who comprised the association (the defendant being one) and became bound by the constitution and by-laws had conspired to "unduly prevent or lessen competition" in the price of coal, evidence was necessary in order to shew that competition in the sale of the article named had been "unduly" prevented. For instance: If three importers of coal in a town enter into an agreement to fix from time to time, as between themselves, the price at which they will sell coal to dealers supplying the consumers, who must agree not to sell to consumers at a less price than that fixed by such importers, it could hardly be said that competition in coal had been "unduly prevented" if there were five other importers in the town who sold to dealers without imposing any restrictions as to the price at which they should sell to consumers.

It appears, however, that all the importers of coal in Brantford were members of the association, and all became bound not to sell below the prices fixed by the association, and any member selling at less than the fixed price became liable to the association in the sum of one dollar for every ton of coal so sold. That without more is sufficient to shew that the combination was of a character which must "unduly" prevent competition in the sale of coal. But in addition to what appears in the by-laws there was evidence as to the method adopted of dealing with tenders for supplies of coal to municipal bodies, by fixing the minimum price and putting up the contracts for sale by auction amongst the members of the association, the unsuccessful bidders not being permitted to tender at as low a figure as the purchaser of the contract, and this is a striking illustration of the manner in which the association absolutely prevented competition in selling coal to municipal bodies.

The finding of the county court Judge should, therefore, be reversed, and the finding should be that there was an agreement by the members of the association to "unduly lessen competition in the sale of coal."

The plaintiff was serving as the agent of the partners forming the association, and as the evidence given by him at the trial shewed that the association was an illegal one within sec. 520 of the Criminal Code, he cannot recover.

The defendant was indicted as a member of a somewhat similar organization known as the Ontario Coal Association, for an offence against sec. 520 of the Code, and was tried before Mr. Justice Meredith, in April, 1903, who found him guilty. That learned Judge gave a written judgment which has not yet been reported. The defendant appealed and the conviction was affirmed by the Court of Appeal (5 O.W.R. 163.)

The judgment appealed against must be set aside, and judgment directed to be entered for the defendant dismissing the action. I think, however, there should be no costs to either party in the Court below or of the appeal.

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Jan. 31.

CLARK V. CAPP.

Master and Servant—Wrongful Dismissal—Writing Solicitor's Letter—Imperfect Workmanship—Isolated act of Negligence.

The plaintiff entered into a written agreement to serve the defendants, who were wholesale manufacturing jewellers, as a "general mounter," which agreement provided that the defendants might dismiss him instantly "if guilty of disobedience to orders, theft, drunkenness, or other misconduct."

The plaintiff, after being in the defendants' service for some months, was instructed to do a particular piece of work, and did it so imperfectly that it was found unmerchantable, and the defendants told him he would have to make it over again "in his own time." He took 12 hours to make it over, and the defendants' manager fined him \$1.45, the equivalent of 6 hours' time. The plaintiff went to a solicitor, who wrote the defendants a courteous letter, demanding payment of the \$1.45, which letter the defendants asked the plaintiff to withdraw, and, on his refusal, paid him the \$1.45, but instantly dismissed him:—

Held, that complaining through his solicitor was not disobedience to orders or other misconduct within the meaning of the agreement, and the plaintiff was entitled to judgment.

THIS was an appeal by the defendants from the judgment of His Honour Judge Morgan, Junior Judge of the county of York, in favour of the plaintiff in an action for wrongful dismissal from the service of the defendants.

The circumstances of the case are mentioned in the judgment.

The appeal was argued on January 23rd, 1905, before FALCONBRIDGE, C.J.K.B., and BRITTON and IDINGTON, JJ.

W. R. Smyth, for the defendants, contended that any cause for dismissal could be relied on by the defendants, though not assigned at the time: *McIntyre v. Hockin* (1889), 16 A.R. 498; *Smith's Master and Servant*, 5th ed., p. 107 *et seq.*; that dismissal here was justified by the plaintiff's refusal to submit to the small fine, and by the incompetence previously displayed. He also referred to *Ridgway v. Hungerford Market Co.* (1835), 3 A. & E. 171.

W. T. J. Lee, for the plaintiff, contended that the agreement between the parties fixed specifically what should be the grounds for instant dismissal, and that the plaintiff could not be dismissed on other grounds, unless on reasonable notice: *Churchward v. The Queen* (1865), L.R., 1 Q.B. 173, 195;

Mayne on Damages, 6th ed., p. 240; that if there had been any incompetency, it had been condoned; and that there had been no wilful misconduct.

Smyth, in reply.

January 31. FALCONBRIDGE, C.J.:—The learned County Judge has, in his considered judgment, taken the correct view of the case.

The ostensible ground of dismissal was not a good or sufficient ground therefor. The plaintiff's solicitor or agent had written a perfectly courteous letter complaining of the deduction of \$1.45 from his wages. This was neither "disobedience to orders, theft, drunkenness, or other misconduct," so as to justify instant dismissal.

No doubt, apart from a special written contract, a servant may be dismissed for gross insolence or rudeness to his master. In most of the cases on this point there was insubordination or disobedience: *Macdonell on Master and Servant*, pp. 213-4.

Each case must be considered by itself, and the plaintiff's conduct here does not present those objectionable features.

I agree too that there was not (having regard to the terms of hiring) such a case of incompetence established as would justify the dismissal even if the defendants were entitled to fall back on that reason instead of the real reason.

The appeal must be dismissed with costs.

BRITTON, J.:—This action is for the alleged wrongful dismissal of the plaintiff by the defendant company.

The plaintiff resided in England, and was engaged by an agent of defendants, "as a general mcunter," to come to this country and work for defendant at 50/- a week, 55 hours of work to constitute the week. The plaintiff agreed to conform to the rules and regulations of the defendant company. He was to come out at his own expense, but if he gave satisfaction and remained with defendants for twelve months his passage money was to be returned to him. The agreement in England was in writing, and was made on September 8th, 1903. The plaintiff at once left England and came to Toronto and entered into the employ of the defendant company, that company being as it is said "Wholesale Manufacturing Jewellers."

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A new agreement in Toronto, prepared by the defendants, was submitted to the plaintiff and was signed by the parties.

The agreement is full—carefully drawn, and properly so, for the protection of the employee, and it contains many stipulations not material for the purposes of this action, but it contains this as to dismissal—

“Notwithstanding anything herein contained the said company may instantly dismiss the said W. Clark from their employment before the expiration of the term of his engagement if he is guilty of disobedience to orders, theft, drunkenness, or other misconduct, and in the event of such dismissal shall not be bound to repay the said sum of \$45.67 hereinbefore referred to.”

In this new agreement, the defendant company agreed to employ, and the plaintiff to serve, “as a mounter,” or in any other branch of the business carried on by the said company for the time being, etc., etc.

The plaintiff worked until about February 26th, 1904, when he was summarily dismissed under the circumstances mentioned hereafter.

The plaintiff was directed to make a silver miniature case, and he did it so badly that it was not merchantable, and it was broken up, and the plaintiff was informed that he would have to make it over, “in his own time.” The plaintiff made it over, and according to the evidence of the defendants’ manager he took 12 hours to do it, but instead of “docking” him 12 hours, he decided to “dock” him for 6 hours. The plaintiff was charged \$1.45 for 6 hours’ time, and on getting his pay on pay day, February 20th, 1904, he received his proper wages less \$1.45 for the 6 hours charged to him. The plaintiff called attention to his pay being short, and Capp told him “he had been docked for that miniature.” The plaintiff said nothing to Capp in reply, but went to a firm of solicitors. The solicitors on February 24th wrote a courteous letter to the defendant company. What happened next is best told by Capp himself.

Q. “What happened on Friday night?” (That is Friday, February 26th, 1904.)

Ans. “Friday night he was told to come into the office, that I wanted to see him, and when he came in I shewed him the

letter, and I asked him if he had sent the letter to me, and he said, 'Yes.' I asked him if he would withdraw it, and he refused to do so, after about quite a time it took him to refuse it. . . . And after doing so, I said, 'Well, I will pay you back what I have deducted from you,' and I offered him the full amount, 12 hours' pay. It was an error on my part, and he said, 'Oh, that is more than I was deducted,' so I said, 'All right, then, I will give you what you were deducted,' and I paid him back, I think it was, \$1.45, and as soon as he accepted that, I said, 'Now I don't want you here any more,' and he turned around and asked me if I meant to discharge him, and I said, 'Yes.'"

The plaintiff afterward offered his services, but the defendants refused, and persisted in the dismissal.

The defendants in their statement of defence justified the discharge of the plaintiff because the plaintiff was "incompetent, dilatory and negligent in fulfilling his duties, and because he refused to pay for the damages sustained by the defendants as the result of his incompetence and negligence."

Unquestionably the real reason for plaintiff's dismissal was that he made his complaint through a firm of solicitors and would not "withdraw" the solicitor's letter.

The plaintiff had the right to personally complain of the deduction, and to remonstrate against being compelled to pay for alleged negligence or incompetence in doing the work. I am not expressing, nor am I in a position to give, an opinion upon 'the merits as to whether the plaintiff was legally liable to pay the \$1.45, or any other sum for defective work, but the plaintiff had a right to put forward his side of the case, and if he could do it personally he could do so by an attorney. I am, therefore, of opinion that the real reason for or cause of the plaintiff's dismissal was insufficient to justify it.

The defendants now say, that they are entitled to rely upon plaintiff's incompetence as good cause for his dismissal, even if the attorney's letter was, in itself, entirely insufficient.

The difficulties in the way of this defence are—

1. The evidence, in my opinion, is not sufficient to establish the plaintiff's incompetence to do the work for which he was employed under the agreement signed after he came to Toronto, or even under the agreement made in England, if that agreement was not wholly superseded by the later one.

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2. The defendants had full knowledge of the plaintiff's skill if not before, certainly when he made the miniature case, and they retained him after that in their employment. They could not do this, and afterwards turn him away for that fault without anything new. *McIntyre v. Hockin*, 16 A.R. 498, is in point in the plaintiff's favour.

Assume that "the condonation is subject to the implied condition of future good conduct, and whenever any new misconduct occurs the old offence may be invoked, and may be put in the scale against the offender as cause for dismissal," can it be fairly urged that complaint, orally, or by letter, of the employee or his solicitor, if courteously made, of a deduction of wages by reason of some alleged fault or wrong doing—is misconduct such as will permit of the old offence being revived, and used to justify dismissal.

I think not.

Upon all grounds I think the decision of the learned county court Judge is right and must be affirmed.

Appeal dismissed with costs.

IDDINGTON, J.:—The defendant engaged the plaintiff by a written agreement to come from England to work here in Toronto, as "a general mounter," in the defendants' business as jeweller, and the plaintiff came and entered upon his work in the defendants' shop, and after (as he says two weeks of such service) he was asked to sign, and did sign, a contract to serve the defendants for a year as a "mounter or in any other branch of the business carried on by the said company for the time being." These written agreements were signed by or on behalf of the defendants.

The defendant Capp says he does not believe, but does not positively deny, that so long a period as two weeks' service had been performed by the plaintiff before this second agreement was executed.

I think we must accept the plaintiff's statement, not only as that of a man positive and more likely to remember than the defendant, who simply does not believe, and whose engagements in business, might prevent him from remembering as well as the other, but also because the second written contract itself

indicates by a departure from the terms of the original writing, the possibility that he might not have turned out to be such a mounter as expected here, or that work of the kind might not be found for him within what lines thereof he could do, and yet that he could in the defendants' service, be a worthy servant.

For five months he proved himself worthy. The defendants' foreman found no fault with him, but as to some trifling matters that would not, under the circumstances, including the foreman's reprobation, have justified dismissal.

One other mistake about mending a pin is all beyond the immediate bone of contention that is brought against him. Perhaps he did make a mistake. If so, his master, through whose hands it passed, failed, though he admits inspecting all such work, to discover it.

The pin was lost. The gentleman to whom it belonged is not very positive as to what caused its loss.

I can find nothing in all this to justify dismissal.

It is alleged that after he had been about five months in the employment of the defendant, he had, after fifteen hours' work, produced an imperfect piece of work.

The defendant set him to do it over again, with the message that he would be docked for the lost time of doing it again.

He did it and took in doing it double the time some men say it should have taken.

When told after he had done it that the defendant was still insisting on docking him a part of the time thus spent, he consulted a solicitor, who wrote for him to the defendants a temperate letter asking payment of the \$1.45 docked. The defendants yielded, but, for this consulting of a solicitor, and solicitor's letter, and the plaintiff's refusal to withdraw same, and no other reason, as the learned trial Judge finds, dismissed the plaintiff.

I agree with the learned Judge's finding. It is abundantly supported by the defendant's own story. The plaintiff was acting within his legal rights. He was not in what he did offensive. He returned on Monday after his dismissal on Saturday, to embrace the opportunity when all the men in the defendants' shop had gone, and again respectfully submit to his master a tender of his services, and was again told to go. No attempt was

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made on either of these occasions, or at any time, to suggest any other cause than this solicitor's letter, as the cause of dismissal. Not even the imperfect piece of workmanship was given as a reason. It is now alleged as a reason justifying the dismissal. It is not sufficient. An isolated failure to maintain perfection in workmanship, even though tainted with negligence, would not suffice to justify dismissal.

It does not go to the whole consideration of the contract on the part of the master so as to justify dismissal.

It is not evidence of habitual neglect. It is not evidence of incompetence, as might within the cases be held to be misconduct of one offering to do a certain class of work and failing to do it. Apart from the occasion being an isolated one, and that, possibly, due to the cause by which the plaintiff excuses himself, it is quite clear from the evidence that there is much doubt as to the limits of work, upon which, a man professing to be a "general mounter," may be called upon to work with reasonable hope of his succeeding at it. I think the burden of shewing that this particular piece or class of work, came within the limits of the trade or calling the plaintiff may have held himself out as being reasonably expert in, fell upon the defendants in this case, and they have failed to shew it as against the mass of evidence looking the other way.

Their own trial and experience of the man, their engagement of him in England, and all that had happened relating to the matter of the plaintiff's service, all go to shew that they were getting such a man as they expected, though not the highest type of skilled workman.

As to the discipline of shop argument, I fail to find anything from reading the whole of the evidence, that entitles the defendants to complain.

The defendant Capp sent his dictatorial message and got a solicitor's reply.

A kindlier method might have evoked a different response.

I think the defendant's appeal should be dismissed with costs.

A. H. F. L.

[TEETZEL, J.]

RE BOWER TRUSTS.

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March 1.

Devolution of Estates Act—Settlement—Remainder to Appointee under Will or in Default to "Right Heirs"—Failure to Appoint—Equitable Estate—Vesting in Administratrix.

The owner in fee simple of certain land, by deed granted it to trustees upon trust to lease, and to pay the rent to him for life, and after his death to convey it to such persons as he by his will should appoint, and in case of his death without a will "To hold the same in trust for the right heirs of (himself) according to the law of descent in Ontario in fee simple" and in the event of the rents not being sufficient for his maintenance, with his consent to sell it and apply the proceeds to his maintenance, etc., and died without making a will and without the land having been sold in his lifetime:—

Held, that the settlor was possessed of an equitable estate in fee simple in the land, which, on his death, vested in his administratrix under the Devolution of Estates Act.

MOTION by the trustees under a deed made by one William Bower, and the administratrix of said William Bower, for the determination of the question whether the lands mentioned in the trust deed devolved upon the administratrix under the Devolution of Estates Act for purposes of distribution.

William Bower being the owner in fee simple of certain land, by deed granted it to trustees upon trust to lease the same, and, after payment of all expenses, to pay the rent to him for life, and, after his death, to convey it to such persons as he by his will should appoint, and, in case of his death without making a will, "to hold the same in trust for the right heirs of (himself) according to the law of descent in Ontario in fee simple;" and, in the event of the rents not being sufficient for his maintenance with his consent, to sell it and apply the proceeds to his maintenance, etc.

William Bower died without making a will, and without the land having been sold in his lifetime, leaving a brother and sisters and the children of two deceased sisters surviving him. Letters of administration to his estate were taken out.

The motion was heard in Weekly Court on the 27th February, 1905, before TEETZEL, J.

McBrayne, for the trustees and administratrix. The trusts in the deed constitute an equitable estate of inheritance

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in fee simple in William Bower, and pass under the Devolution of Estates Act, R.S.O. 1897 ch. 127, sec. 3: *Armour on Devolution*, p. 17. The estate in the settlor and the right heirs are both equitable, so the rule in *Shelley's case* applies, with the result that an estate in fee is in the settlor: *Richardson v. Harrison* (1885), 16 Q.B.D. 85; *Cooper v. Kynock* (1872), L.R. 7 Ch. 398; *Van Grutten v. Foxwell*, [1897] A.C. 658. The remainder in fee in default of appointment is in his heirs, and on such default the life estate and remainder coalesce: *Farwell on Powers*, 2nd ed., p. 56. There is no direction to convey to the right heirs. The settlor could have revoked the deed or conveyed the fee simple at any time before his death. The effect of the deed was, that if no will was made the land would pass as in case of intestacy. The fee was always vested in the settlor: 1 *Preston on Estates*, pp. 504, 506.

March 1. TEETZEL, J.:—Upon the authorities cited by Mr. McBrayne I think it is quite clear that the settlor—William Bower—was possessed of an equitable estate in fee simple in the lands described in the trust deed in question, which estate is now under the Devolution of Estates Act vested in his administratrix. There being no disposition of the estate provided for under the deed upon the testator's death, the duty is cast upon the administratrix to proceed to realize upon and distribute the same under the provisions of the said Act.

As there appears to be no conflict between the trustees and the administratrix, I do not consider it at present necessary to determine whether the legal estate is in the trustees or administratrix.

To remove any question on this point, when title is being made, both should join in the conveyance.

Costs out of the estate.

G. A. B.

[MEREDITH, C.J.C.P., AND TEETZEL, J.]

IN RE WENTWORTH ELECTION (DOMINION).

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SEALEY V. SMITH.

Feb. 10.

Parliament—Election of Members—Ballots numbered by Deputy Returning Officer—Dominion Elections Act 1900, sec. 80, sub-sec. 2.

The prohibition contained in sub-section 2 of section 80 of the Dominion Elections Act, 1900, 63 & 64 Vict. ch. 12 (D.), against the counting of ballot papers "upon which there is any writing or mark by which the voter could be identified" applies to ballot papers upon which a deputy returning officer has placed (not in the cases specially provided for in the Act) numbers corresponding respectively with the numbers opposite the names of the respective voters in the poll book, and such ballot papers must be rejected. Where in consequence of this irregularity ballot papers sufficient in number to alter the result of the election had to be rejected, it was held, applying the principle of *Woodward v. Sarsons* (1875), L.R. 10 C.P. 733, that there must be a new election.

PETITION under the Dominion Controverted Elections Act. to set aside the election of the respondent as member for the electoral district of Wentworth in the Parliament of Canada.

The petition was heard before MEREDITH, C.J.C.P., and TEETZEL, J., at Hamilton, on the 1st of February, 1905.

A. B. Aylesworth, K.C., and R. A. Grant, for the petitioner.

Geo. Lynch-Staunton, K.C., W. A. H. Duff, and H. C. Gwyn, for the respondent.

February 10. The judgment of the Court, in which the facts are stated, was delivered by MEREDITH, C.J.C.P.:—The respondent was declared elected on a recount had before the senior Judge of the county court of the county of Wentworth, but the petitioner claims the seat, alleging that upon a proper counting of the ballot-papers being had it will be found that he received a majority of the votes cast and was duly elected.

The petition contains charges of corrupt practices, and there is a cross-petition filed by the respondent making similar charges against the petitioner. These charges have been abandoned by both parties, and they have agreed on a special case, which contains a statement of the facts, upon which the opinion of the Court is asked upon the following questions:—

1. Is the respondent E. D. Smith the duly elected member for the electoral district of Wentworth?

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2. If not, is the petitioner W. O. Sealey the duly elected member for the said electoral district of Wentworth?

3. Or is the said election for the electoral district of Wentworth null and void?

The result, as far as it is to be determined by the counting of the ballot-papers, depends upon whether the learned senior Judge was right in rejecting, as he did, all those cast at polling subdivision number 23 in the township of Beverley.

The claim of the respondent that these ballot-papers ought not to have been, as they were, counted by the deputy returning officer, and were properly rejected upon the recount, is based upon the provisions of sub-sec. 2 of sec. 80 of the Dominion Elections Act, 1900; 63 & 64 Vict. ch. 12 (D.).

The sub-section is as follows: "(2) In counting the votes he (*i.e.*, the deputy returning officer) shall reject all ballot-papers which have not been supplied by the deputy returning officer, all those by which votes have been given for more candidates than are to be elected, and all those upon which there is any writing or mark by which the voter could be identified, other than the numbering by the deputy returning officer in the cases hereinbefore provided for."

Each of the ballot-papers in question had on the back of it a number which corresponded with that put opposite to the name of the voter in the poll book, and it was placed there by the deputy returning officer before the ballot-paper was handed to the voter.

It was argued on behalf of the petitioner that this numbering of the ballot-papers did not affect their validity, for two reasons: (1) because it was the act of the deputy returning officer, and, as it was said, the section does not apply to a writing or mark on the ballot-paper made by any one but the voter; and (2) because it is only a writing or mark by which, without calling in the aid of extrinsic evidence, the voter could be identified, that requires or justifies the rejection of the ballot-paper.

The Election Act, by which the system of voting by ballot was first introduced, was 37 Vict. ch. 9 (D.), and the provision in it as to the rejection of ballot-papers was substantially the same as that contained in sub-sec. 2 of sec. 80 of the Act of

1900, except that the concluding words, "other than the numbering by the deputy returning officer in the cases hereinbefore provided for," are not found in the original provision (sec. 55), though the Act contained a provision for the numbering of the ballot-papers supplied to any person representing himself to be a particular elector named on the register or list of voters who applied for a ballot-paper after another person had voted as the elector: sec. 53.

Two other classes of ballot-papers were by sec. 37 of the Electoral Franchise Act [48 & 49 Vict. ch. 40 (D.)] required to be numbered.

It was not, however, until the revision of the statutes in 1886 that any change was made in the provision in the Election Act for the rejection of ballot-papers by the introduction of any qualification of the generality of the provision as to rejecting ballot-papers on which a writing or mark, by which the voter could be identified, appeared.

In the Consolidated Statutes the Election Act appears as ch. 8, and the section providing for the rejection of ballot-papers is sec. 56. There for the first time is introduced the qualification to which I have referred, and it is in the very words in which it is expressed in sec. 80 of the Act of 1900.

The Act of 1900, it may be remarked here, introduced another class of ballot-papers which the deputy returning officer is required to number: sec. 67.

It is somewhat singular that nowhere in the Act is there to be found any provision forbidding the voter to place upon his ballot-paper any mark by which he can afterwards be identified, nor any declaration that a ballot-paper upon which such a mark is placed shall be void, though no doubt in "the directions for the guidance of electors in voting," which the deputy returning officer is by sec. 41 required, before or at the opening of the poll on the day of polling, to "cause to be posted up in some conspicuous place outside of the polling station and also in each compartment of the polling station," electors are informed, among other things, that if the voter "places any mark on the ballot-paper by which he can afterwards be identified, his vote will be void and will not be counted."

If sec. 80 did not contain the qualification to which I have

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referred, I should, if unfettered by authority, be disposed to hold that it was only a writing or mark placed on the ballot-paper by the voter himself or by his connivance, or with his consent, that justified the rejection of his ballot-paper.

On principle, it appears to me most unjust that an elector who has complied with every requirement of the law as to the manner in which he shall evidence his will as to the choice of a member of Parliament, should be subjected to have his vote destroyed by the wrongful or improper act of an election officer in dealing with his ballot-paper, and the Court is bound, I think, if possible, to avoid construing such a provision so as to lead to that result.

Reading the provision as to the rejection of ballot-papers, as it stood before the revision of the statutes in 1886, in connection with the directions for the guidance of electors in voting, no canon of construction would be violated, I think, by interpreting the words "any writing or mark by which the voter could be identified" as meaning "any such writing or mark placed on the ballot-paper as is mentioned in the directions," and therefore as extending only to those placed on it by the voter himself, or by his connivance or with his consent.

We are not, however, at liberty to deal with the question as *res integra*, for it has been passed upon by election Judges whose decisions we ought to follow, leaving it to an appellate Court, if they ought not to govern, to so declare, especially as though the Legislature of the Province of Ontario has expressly provided by an amendment of its election law against a ballot-paper being rendered void by "words or marks corruptly or intentionally or by mistake written or made, or omitted to be made, by the deputy returning officer on a ballot-paper" [42 Vict. ch. 4, sec. 18 (O.)], the Parliament of Canada has not seen fit to enact such an amendment to its election law.

In *In re East Hastings* (27th January, 1879), H.E.C. 764, the question was directly raised, and the election Judge (Armour, J.) held that ballot-papers upon which a deputy returning officer had placed a number corresponding with that which appeared opposite to the name of the voter in the voters' list, were rightly rejected.

The Act in force when the election which was in question

in that case was held, was the Act of 1874, as amended by 41 Vict. ch. 6 (D.), the 43rd section of which, as amended, required the deputy returning officer to place on the counterfoil of the ballot-paper a number corresponding to that opposite the voter's name on the voters' list.

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The voters' lists in use at the election were, no doubt, copies of the Provincial voters' lists, and there would therefore have appeared in them opposite to the voter's name his number upon the assessment roll, and it was these numbers that the deputy returning officer had placed upon the ballot-papers which it was held were rightly rejected.

Mr. Aylesworth pointed out, as supporting his second ground of argument, that certain ballot-papers upon which a number had been placed by the deputy returning officer were held not to be thereby made subject to rejection, but I am unable, when the circumstances are considered, to see that this supports his contention. The testimony of the deputy returning officer shewed that he had placed the same number both on the counterfoil and on the ballot-paper, but those numbers were taken at random, and as he deposed and the election Judge found, the voter could not be identified by them, and it was upon this ground that it was held that these ballot-papers ought not to be rejected.

It was probably in consequence of the decision in the *East Hastings* case that the amendment of the Ontario Act to which I have referred was made.

The question [arising on the Ontario Act] was again dealt with in *In re Russell, No. 2* (4th December, 1879), H.E.C. 519, the election Judges being the then Chief Justice of Ontario and Vice-Chancellor Blake.

In that case the deputy returning officers at certain of the polling subdivisions had placed numbers on the backs of the ballot-papers corresponding with the numbers put opposite to the voters' names in the voters' lists.

Referring to the effect of this upon the ballot-papers, the Chief Justice said (p. 522): "Under the Act of 1874 (R. S. O. 1877, ch. 10) that would, I apprehend, have been a fatal objection to the validity of the vote, but the Act of 1879 [42 Vict. ch. 4 (O.)] was passed for the very purpose of remedying that

Meredith, C.J. difficulty ;” and the Vice-Chancellor said (p. 527): “Unfortunately, ignorantly but honestly, they so dealt with the ballots as that, except for the Act of 1879, these votes must necessarily have been rejected, while neither the petitioner nor the respondent is responsible for that.”

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What was said by Vice-Chancellor Blake is important, as much reliance was placed by the petitioner's counsel upon what was said by that learned Judge in *In re Monck* (17th January, 1876), H. E. C. 725, particularly at pp. 728 and 731; but the view expressed in the later case shews that what was said by him in the earlier one was not directed to such a writing or mark on the ballot-paper as the numbering of it by a deputy returning officer as had taken place in *In re Russell*, No. 2.

In re Russell, No. 2, is important also because the numbers which had been placed on the ballot-papers were not numbers corresponding with those set opposite the voters' names in the voters' list of the municipality (*i.e.*, the numbers on the assessment rolls), but the numbers which by sec. 6 of the Act of 1874 the deputy returning officer was required to place opposite to every name in his voters' list, which, as the section provides, need not be consecutive numbers, but might be chosen arbitrarily by the deputy returning officer.

In *In re Bothwell* (1884), 8 S.C.R. 676, although it was not necessary for the Court to decide, and it did not decide that the ballot-papers which the deputy returning officer had numbered, as the ballot-papers in this case were numbered, were bad and ought not to have been counted, Henry, and Gwynne, JJ., expressed strong opinions that such ballot-papers were illegal and bad: p. 714, and p. 720 *et seq.* Fournier, J., also (p. 710) referring to the numbering by the deputy returning officer at polling subdivision number 1 Sombra, and the erasure by him of the numbers, spoke of the numbering as an error which, if it had not been then repaired, might have had serious consequences (*une erreur qui, si elle n'eût pas été réparée alors, auraient pu avoir de graves conséquences*). The judgment of the Chief Justice (Ritchie) also indicates, I think, that but for the erasing of the numbers he would have held the numbered ballots to be bad.

Strong, J., however, expressly guarded himself from being

taken, by assenting to the judgment of the Court, to preclude himself from the right to consider in any future case in which the question might arise, whether any mark put on a ballot by mistake and in good faith by a deputy returning officer was to be held a ground for rejecting the ballot.

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It is also to be noticed that the election Judge from whose judgment the appeal to the Supreme Court was taken, had treated it as clear that all the votes at subdivision number 3 Dawn, must have been rejected because the deputy returning officer had indorsed on each ballot-paper the number of the voter on the voters' list, "so that," as he said, "there could be no difficulty whatever in ascertaining how each elector had voted:" pp. 680-1.

In the face of the decision of the election Court in *In re East Hastings*, H.E.C. 764, and of the body of judicial opinion to which I have referred, it would not be open to me to give effect to my own view as to the scope of the provision for rejecting ballot-papers upon which a writing or mark by which the voter could be identified appears, even as that provision stood before the amendment made in the Revised Statutes and subsequently re-enacted in the Act of 1900, and the amendment then introduced and so re-enacted makes it still more impossible for me to do so.

The amendment amounts, in my opinion, to an adoption by Parliament of the construction which had been given to the enactment in *In re East Hastings*, and was apparently designed to prevent a ballot-paper, which the deputy returning officer had numbered in the proper discharge of his duty, and as he was required by the Act to do, from being rejected at the counting of the ballot-papers. The amendment was probably unnecessary, as a writing or mark which the deputy returning officer was required by the Act to put upon the ballot-paper, although it afforded means for identifying the voter by whom it had been cast, could not by possibility have been intended to be treated as a writing or mark within the meaning of sec. 80. The introduction of the amendment nevertheless, in my opinion, is a clear indication that it was intended that a writing or mark, though made by the deputy returning officer, if it was one by which the voter could be identified, unless it was the

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numbering by the deputy returning officer in the cases provided for in the previous sections, should render necessary the rejection of the ballot-paper in the counting of the votes.

It was said by counsel for the petitioner that in a comparatively recent unreported case, *In re North Bruce*, it was held by the Chancellor of Ontario and my brother Street that ballot-papers, numbered as those in question in this case were, ought not to be rejected under the provisions of sec. 80; but a perusal of the shorthand notes of the proceedings in that case leads me to think that that was not the ruling of the learned Judges, and that if it had appeared that the numbers which had been put on the back of the ballot-papers corresponded with those which were set opposite to the voters' names either in the voters' list or in the poll book, the ballot-papers would have been rejected.

It was argued by Mr. Aylesworth that in all the cases in which ballot-papers had been rejected because of their being numbered, the number placed on the ballot-paper corresponded with that which appeared in the voters' list opposite to the voter's name. I have already pointed out that that was not so in *In re Russell, No. 2*, H.E.C. 519, but even if it were as Mr. Aylesworth contended, I am unable to discover any reason for rejecting the ballot-paper in such a case, which does not apply where the number on the ballot corresponds with that which appears opposite to the voter's name in the poll book. The poll book is, of course, open to the view of the deputy returning officer and the poll clerk, and there is nothing to prevent the agents of the candidates from examining it—if, indeed, they are not entitled to do so—and therefore nothing to prevent any of those persons from ascertaining both the number on the poll book and that on the ballot-paper, and in that way discovering the identity of the voter, and so the intended secrecy of the ballot may be violated.

Where the numbered ballot is in use, for the very purpose of guarding against the possibility of the voter being identified, careful provision is made that in counting the ballot-papers the number which is on the back of the ballot-paper shall not be seen by those who are present when the counting takes place.

The provision in this respect of the Ontario Act (sec. 17,

sub-sec. 1) is that the deputy returning officer "shall examine the ballot-papers, keeping them with their printed faces upwards, and shall take all proper precautions for preventing any person from seeing the numbers printed on the back of the paper;" and a similar provision was contained in the English Act of 1872 (35 & 36 Vict. ch. 33, sched. 1, sec. 33). See also sec. 30 of the Ontario Act, and sec. 4 of the English Act.

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On the other hand, in the Dominion Act, sec. 80 (1), it is provided that the deputy returning officer "shall open the ballot-box and proceed to count the number of votes given for each candidate, giving full opportunity to those present to examine each ballot."

I refer also to *In re Haldimand* (1888), 15 S.C.R. 495, and particularly to what was said by Strong, J., at p. 515, and by the present Chief Justice of Canada at p. 528.

The cases in which the question has arisen on a recount, which were cited by Mr. Aylesworth, are, I think, distinguishable. There the Judge has very limited powers, and is unable, in determining whether a ballot-paper should be counted or rejected, to seek assistance from anything but the ballot-paper itself.

This is well pointed out in one of the cases, *In re Digby* (1887), 23 C.L.J. 171, as well as in the recent decision of Ardagh, Co. J., in *In re North Simcoe* (1904), 41 C.L.J. 29.

Mr. Aylesworth's contention that the principle of *Woodward v. Sarsons* (1875), L. R. 10 C. P. 733, had been departed from in the more recent cases, is not, I think, well founded. The *Cirencester Case* (1893), 4 O'M. & H. 194, which he cited for that contention, does not, I think, support it. The Court was there dealing with marks made by the voter, and there is nothing to indicate that the authority of *Woodward v. Sarsons*, so far as it dealt with the numbering of the ballot-papers, was intended to be denied or questioned.

No doubt there was an advance made in the direction of departing from the more strict rule which had been applied in the former cases to disfranchise a voter who had by his ballot-paper clearly indicated the candidate for whom he intended to vote, on account of the imperfect manner in which he had marked his ballot-paper, but nothing whatever was said to

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indicate that extrinsic evidence is not admissible to prove that by the mark which appears upon the ballot-paper the voter could be identified; on the contrary, Hawkins, J., said (p. 198) that the question whether the mark is one by which the voter can be identified *is a matter of fact*.

It is difficult to suggest any mark that it is possible to put upon the ballot-paper which, standing alone and without calling in the aid of extrinsic evidence, could be found to be one by which the voter could be identified.

To illustrate by a simple case: a voter, John Smith, writes upon his ballot-paper the words, "this is the ballot of John Smith," having arranged that that is the sign by which he will shew to the agent of a candidate that he has voted for that candidate. The writing by itself does not shew that the ballot-paper is the one handed to John Smith, nor would it appear that John Smith was an elector who had voted, unless reference were made to the poll book—and what would such a reference be but the calling in of extrinsic evidence?

It is nevertheless, I confess, singular that the only provision in the Election Act dealing with the effect of a writing or mark on the ballot-paper by which the voter could be identified, except the directions for the guidance of electors, is that providing for the rejection of the ballot-paper when the counting of the votes is taking place at the close of the poll, and that there is nothing in terms providing that the ballot-paper shall be void, and the result of the legislation, as it has been interpreted by the Courts, is certainly anomalous. The deputy returning officer must decide as to the rejection of the ballot-paper on the inference which may be drawn from what appears on the ballot-paper itself, and that alone, and on the recount the Judge is confined to the same inferences. The decision of the deputy returning officer is final, subject to reversal on recount or on petition questioning the election or return: sec. 81; and yet on petition questioning the election or return, according to the decisions, the scope of the inquiry is widened and extrinsic evidence is admissible to prove that the writing or mark which appears on the ballot-paper is one by which the voter could be identified.

The cases and opinions to which I have referred are .

conclusive against the second ground urged by Mr. Aylesworth, for they establish beyond doubt that a number placed on the ballot-paper corresponding with that set opposite to the voter's name is a writing or mark by which the voter could be identified, within the meaning of sub-sec. 2 of sec. 80.

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I come, therefore, to the conclusion that all the ballot-papers in question were rightly rejected.

There remains to be considered the question whether the election should be avoided or the respondent should be declared to have been elected.

In *Woodward v. Sarsons*, L.R. 10 C.P. 733, it was said by Lord Coleridge (p. 743): "An election is to be declared void by the common law applicable to parliamentary elections, if it was so conducted that the tribunal which is asked to avoid it is satisfied, as a matter of fact, either that there was no real *electing* at all, or that the election was not really conducted under the subsisting election laws. As to the first, the tribunal should be so satisfied, *i.e.*, that there was no real electing by the constituency at all, if it were proved to its satisfaction that the constituency had not in fact had a fair and free opportunity of electing the candidate which the majority might prefer. This would certainly be so, if a majority of the electors were proved to have been prevented from recording their votes effectively according to their own preference, by general corruption or general intimidation, or by being prevented from voting by want of the machinery necessary for so voting, as, by polling stations being demolished, or not opened, or by other of the means of voting according to law not being supplied, or *supplied with such errors as to render the voting by means of them void*, or by fraudulent counting of votes or false declaration of numbers by a returning officer, or by other such acts or mishaps."

These observations by Lord Coleridge were quoted with approval by Harrison, C.J., in *In re Johnson and Lambton* (1877), 40 U.C.R. 297, at pp. 306, 307, and acting upon the same principle it was held in *In re East Hastings*, H.E.C. 764, that the effect of the numbering of the ballots and their consequent rejection was not to seat the candidate who, if the rejected votes had been counted, would have been in a minority, but to avoid the election, and it was avoided accordingly.

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The same conclusion ought, in my opinion, to be reached in this case.

In this case the majority of the electors had not in fact "a fair and free opportunity of electing the candidate" whom they preferred, for enough of them to turn the majority into a minority were prevented from voting by the "means of voting according to law being supplied with such errors as to render the voting by means of them void," for every ballot-paper supplied at polling station number 23, when it was handed to the voter, was so marked as "to render the voting by means of it void," and so in effect every voter at that polling station was disfranchised.

I would, therefore, answer the questions of the stated case as follows:—

That the respondent is not the duly elected member for the electoral district of Wentworth;

That the petitioner is not the duly elected member for the said electoral district of Wentworth;

That the said election for the electoral district of Wentworth is null and void;

And, following the course taken in *In re East Hastings*, and *In re Russell, No. 2*, there should be no costs to either party.

R. S. C.

[ANGLIN, J.]

CALEDONIA MILLING CO. v. SHIRRA MILLING CO.

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Jan. 31.

*Water and Watercourses—Grant of Water Power—Construction—Specific Use—
“Their Own Purposes”—“Surplus Water.”*

The plaintiffs and defendants were respectively the owners of grist mills, and were each seised in fee of an undivided half of a dam on a river, and both had the right, by an agreement between their predecessors in title made in 1880, to draw water therefrom “for their own purposes.” The agreement provided for the maintenance and repair of the dam at the joint and equal expense of the parties, and that both should be equally interested in rents derived from supplying water to others. For many years the parties and their predecessors had used the waters stored by the dam as they required them. The owner of a saw mill above the defendants’ grist mill had, under a lease from the common grantor of the plaintiffs and defendants, the right to use “surplus waters” stored by the dam and not required by the grist mills. This right was continued by the separate owners of the grist mills; and the plaintiffs and defendants, under the agreement, shared equally in the rents. Shortly before this action was begun, the defendants became the owners of the saw mill:—

Held, that a construction of a grant of a water power which will restrict the grantee to the specific use to which the water was applied when the grant was made, will not be adopted, unless the language of the grant unmistakably indicates such to have been the intention of the parties.

Held, upon the documents and evidence, that each party had an absolute right to use, in a reasonable manner, for their own purposes, so much of the dammed water which might properly be used for generating power as they required, not exceeding one-half of the whole, and so much of the remaining water, which might be properly so used, as would not interfere with or impair the user in a reasonable manner by the other party of the water to which he was entitled, and which he from time to time required.

“Their own purposes” meant any lawful uses to which the water might reasonably be put in a business owned and conducted by the party, as distinguished from a grant or lease to a third party of the right to use such water; and any water not required by either party “for their own purposes,” thus defined, was “surplus water.”

ACTION for an injunction and damages, in respect of the matters referred to in the judgment, tried before ANGLIN, J., without a jury at Hamilton, on the 10th January, 1905.

G. Lynch-Staunton, K.C., and *A. O’Heir*, for the plaintiffs.

E. E. A. DuVernet and *H. Arrell*, for the defendants.

January 31. ANGLIN, J.:—This action is brought to restrain an alleged wrongful use by the defendants of water drawn from a dam known as No. 5, erected at Caledonia on the Grand river, and for damages. This dam was erected under statutory powers by the Grand River Navigation Company, who owned and operated mills upon the lands situated on

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opposite banks of the Grand river, on which the grist mills of both the plaintiffs and defendants are erected, and also the land upon which the saw-mill mentioned below stands. A subsequent owner of these two grist mill properties desiring to dispose of them to different purchasers, it became necessary to provide for the interest which each purchaser should have in the dam and water privileges upon which both depended for power.

The parties have not seen fit to put in evidence the deeds by which the last common owner of both properties conveyed his title to his several grantees, nor has it been shewn with which property he first parted. I am obliged to infer the terms in which these grants were couched from the language of an agreement made between the respective predecessors in title of the plaintiffs and the defendants, dated the 20th January, 1880, which recited that each of the two parties to such agreement "is seised in fee of an undivided half of the works known as dam number 5 at Caledonia on the Grand river," and that "both the said parties have the right to draw water from and use the said dam number 5, for their own purposes." This agreement provides for the maintenance and repair of this dam at the joint and equal expense of the parties, and also contains the following clause:

"And it is hereby further declared, agreed, and understood by and between the said parties hereto that they are and shall be equally interested in all the rents now derived or which may hereafter be derived from the supplying of water from the said dam number 5 to any other person or persons or corporations other than the parties hereto themselves, and that, in the event of it being desirable at any future time to lease the privileges of using water from said dam, the parties hereto shall each have an equal voice therein and be equally interested in any rents or revenues derived therefrom."

The deed to the plaintiffs from their immediate predecessors in title, William and Hugh Scott, purports to convey an undivided one-half interest in all the works known as dam number 5 . . . together with an undivided one-half interest in and to the water rights and privileges and water rents due and accruing due after the date hereof from all and every person

and persons whomsoever in respect of the said dam" . . . subject to the agreement of the 20th January, 1880.

The deed to the defendants from their immediate predecessor, Robert Shirra, purports to convey "an undivided half in all the works known as dam number 5 . . ."

For many years the present litigants and the former respective owners of the two grist mills have used the waters stored by the dam number 5 as they required them. At the time these properties passed into the hands of distinct owners, the proprietor of a saw-mill, situated on the same side of the river as, but above, the grist mill of the defendants, had, under a lease from their common grantor, a right to use surplus waters stored by the dam and not required for the grist mills, in order to furnish power for his saw-mill. This right was continued by the separate owners of the grist mills by new leases, and, under the agreement of the 20th January, 1880, they for many years shared equally in the rentals derived from this source. Recently this saw-mill being in the market, the defendants acquired it. They now assert a right, without paying rental therefor, and regardless of the effect of such use upon the sufficiency of the supply of water for the requirements of the plaintiffs' grist mill, to take from the dam, in order to run this newly acquired property, with larger wheels and increased power, and for purposes other than a saw-mill, such quantity of water as they require for the uses to which they are putting it. The defendants in effect say that as tenants in common of the dam and other privileges, they are entitled to use "for their own purposes" as much of the water stored by the dam as they require. The plaintiffs maintain that the rights of the parties are restricted to the use of so much water as may be required to run their respective grist mills—and that the right to use surplus waters not required for these purposes must be disposed of for the joint and equal benefit of both parties, pursuant to the agreement of the 20th January, 1880.

The evidence satisfies me that the defendants have not restricted themselves to the use of surplus waters for their newly acquired mill, but that they have in fact, for this, purpose, drawn off waters which were required for the plaintiffs' grist mill, and that in so doing they have also used more than

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one-half of the waters stored by the dam. In these circumstances I have to determine the rights of the parties in the premises.

If these rights have been the subject of adjustment by contract between the parties, or are defined by the documents creating them, it is upon the construction of these instruments that their extent and scope must depend. In such construction it is proper to take into account the surrounding circumstances existing at the time the grants and contracts were made: *Douglass v. Whittemore* (1860), 32 Vt. 685; *Lindeman v. Lindsey* (1871), 69 Pa. St. 93, 99.

The predecessors in title of the plaintiffs and defendants acquired their respective rights by the conveyances from their common grantor. By the agreement of the 20th January they at least partially expressed their understanding of these rights. The authorities are uniform that a construction of a grant of a water power which will restrict the grantee to the specific use to which the water was applied when the grant was made will not be adopted unless the language of the grant unmistakably indicates such to have been the intention of the parties: *Hines v. Robinson* (1869), 57 Me. 324; *Terry v. Smith* (1888), 47 Hun 333; *Fowler v. Kent* (1902), 71 N.H. 388; Angell on Watercourses, 7th ed., p. 261; Gould on Waters, 3rd ed., p. 612. I find no provision restricting the use of the waters stored by dam No. 5 to any particular purpose, or to any particular mill.

No doubt, all rights of property and all interests in easements or privileges in or connected with this dam are vested in the plaintiffs and the defendants. Of the dam itself they are owners in common; in the easements and privileges each has an undivided half interest. "An undivided half of a thing involves the idea of another half in common; and the owners of each, in the absence of express limitation, must have equal rights and privileges in the whole:" *Dow v. Edes* (1877), 58 N.H. 193, 195. These, by the agreement of the 20th January, 1880, have been stated to assure to both owners "the right to draw water from and use the dam number 5 for their own purposes." Reading the documents before me together and in the light of the circumstances as disclosed in evidence, in my opinion they indicate the following to be the rights of the parties as to the user of the dammed water:—

1. Each party has an absolute right to use in a reasonable manner (*Batavia Manufacturing Co. v. Newton Waggon Co.* (1878), 91 Ill. 230, 245, *Appleton Pulp Co. v. Kimberly* (1898), 100 Wisc. 195), for his own purposes, so much of the dammed water which may properly be used for generating power as he requires, not exceeding one-half of the whole of such water: *Runnels v. Bullen* (1823), 2 N.H. 532, 537; *Bailey v. Rust* (1839), 15 Me. 440; *Richards v. Koenig* (1869), 24 Wisc. 360.

2. Each party has a right to use, for his own purposes, over and above the one-half to which he has such absolute right, so much of the remaining water, which may be properly so used, as will not interfere with or impair the user in a reasonable manner by the other party of the water to which he is entitled and which he from time to time requires: *Howe Scale Co. v. Terry* (1874), 47 Vt. 109, 126.

3. By "their own purposes" are meant any lawful uses to which such water may reasonably be put in a business owned and conducted by the party itself, as distinguished from a grant or lease of the right to use such water to a third party.

4. Any water not required by either party for "his own purposes," thus defined, is "surplus water" to be dealt with according to the provisions of the agreement of the 20th January, 1880.

Judgment will be entered declaring the rights of the parties in these terms, and enjoining the defendants from using the water stored by dam number 5 in contravention of the plaintiffs' rights so declared.

Upon the evidence before me I am unable to say what damages were sustained by the plaintiffs by reason of the wrongful use made by the defendants of the water, which, under the foregoing declarations, they were not entitled to use. Their right to recover such damages as they have suffered I affirm: *Runnels v. Bullen*, 2 N. H. 532, 535. Unless the plaintiffs are prepared to accept a judgment for nominal damages of \$25, which, if so advised, they may enter, they may, by electing to take it within ten days, have a reference to the local Master at Hamilton to ascertain the damages to which they are entitled.

Though not wholly right in their contentions, the plaintiffs,

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in obtaining a judgment enjoining wrongful and excessive use by the defendants of dammed water and for damages, have had a substantial measure of success. They should have their costs of this action down to the present time.

Costs of the reference and further directions, should the plaintiffs elect to take a reference, will be reserved.

E. B. B.

[IN THE COURT OF APPEAL.]

C. A.

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Jan. 23.

REX V. MARTIN.

Criminal Law—Joint Trial of Two Persons for Murder—Evidence—Confession of one Implicating the Other—Admissibility—Caution to Jury—Addresses to Jury—Right of Reply—Counsel Representing Attorney-General—Criminal Code, secs. 592, 661 (2).

Upon the joint trial of two accused persons for murder, a statement or confession of one, which tended to incriminate the other, was admitted in evidence, the jury being cautioned that it was evidence only against the one who had made it:—

Held, properly admitted.

Semble, that in order to the admissibility of a statement made by an accused, having regard to sec. 592 of the Criminal Code, it need not appear that it is a full acknowledgment of guilt so as to be a confession in the strictest sense of the term. If it connects or tends to connect the accused, either directly or indirectly, with the commission of the crime charged, it cannot be excluded on the ground that it is not a plenary confession.

Semble, per OSLER, J.A., that in a case where such a confession or statement is intended to be used the prisoners should be tried separately.

Held, that under sec. 661 (2) of the Code, the Crown represented by counsel acting on the instructions of the Attorney-General, had the right of reply, although no witnesses were examined for the defence.

Rulings of FALCONBRIDGE, C.J.K.B., upheld.

THE prisoner Alexander Martin, and his wife Ethel Martin, were tried before FALCONBRIDGE, C.J.K.B., presiding at the sittings of oyer and terminer and general gaol delivery for the county of York, on a joint indictment wherein they were charged with the murder of their infant son.

The prisoners were defended by different counsel, but did not otherwise separate in their defence.

In the course of the trial Agnes Whidden, police matron at the Court street station, Toronto, was called as a witness for the Crown, and testified that the female prisoner, after being cautioned by the witness, had made a statement to her. She proceeded to testify that the prisoner first stated that the police said that she killed her baby, and then said: "I did not kill it but saw it killed." She went on to say that she and her husband went out one afternoon in a boat together with the baby. At this point counsel for the female prisoner, stating that counsel for the male prisoner joined with him, objected to the reception of the evidence. He admitted that anything the female prisoner said, after proper caution, would be evidence against herself, but he submitted that anything stated by her in the absence of her husband could not be used as evidence against him. The Chief Justice ruled that he could not exclude the evidence, because the statements were receivable against the person who made them. He then informed the jury that he could not exclude the evidence, but that it was not evidence against the male prisoner, and said he would again refer to the matter in his charge. The witness then gave the whole statement made to her. In substance it tended to shew that the male prisoner killed the child by striking him with something, she was not sure what, and then throwing him into the water, and that she took no part in the crime.

Subsequently, in his charge, the Chief Justice repeated to the jury several times that the testimony of Agnes Whidden was not evidence against the male prisoner, and must not be considered by the jury in weighing the evidence against him.

No witnesses were examined for the defence, and counsel for the prisoners claimed the privilege of addressing the jury last, and contended that the counsel for the Crown was not entitled to reply. Mr. Proudfoot, K.C., who appeared for the Crown representing the Attorney-General, claimed the right to reply, and the Chief Justice ruled in his favour.

The jury found the prisoner Alexander Martin guilty, and acquitted the female prisoner.

At the request of counsel for Alexander Martin, the Chief

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Justice reserved a case for the opinion of this Court upon the following questions:

1. Whether or not the alleged statement of the female prisoner to Agnes Whidden was properly admitted as evidence when the prisoners were tried together.

2. Whether or not, no evidence being adduced by either of the prisoners, counsel for the defence had the right of reply, the ruling of the Chief Justice being that counsel for the Crown, "who claimed to be acting on behalf of the Attorney-General," had the right of reply.

The case was argued before MOSS, C.J.O., OSLER, MACLENNAN, GARROW, MACLAREN, JJ.A., on the 9th December, 1904.

A. R. Hassard, for the prisoner Alexander Martin. The statement made to Agnes Whidden by Ethel Martin was inadmissible. Whidden was called by the Crown. The Chief Justice told the jury that the statement was not evidence against Alexander Martin, but could not be excluded. I submit the following propositions:—1. Every statement made by an accused person is not evidence. 2. Some statements are not evidence at all. 3. Nothing but a confession is evidence. 4. A statement cannot be used as evidence for an accused. 5. What was given was not a confession. 6. The statement cannot be used at all. 7. Even if a confession, it was not admissible even against Ethel Martin while Alexander Martin was on trial with her. See Thompson on Trials, vol. 1, pp. 439, 446; Phipson on Evidence, 2nd ed., p. 254. The statement must be a confessional statement. What is a confession? Definitions will be found in Leviticus, ch. v., v. 6; Joshua, ch. vii., v. 19; Salkowski's Roman Law, pp. 138-9; Bouvier's Law Dict., vol. 1, p. 387; Black's Law Dict., p. 248 (it must inculcate the person who makes it); *State v. Carr* (1880), 53 Vt. 37, 44; *People v. Hickman* (1896), 45 Pac. R. 175; *Mora v. People* (1893), 19 Colorado 255; Standard Dict., vol. 1, p. 394; Webster's Dict., p. 271; Imperial Dict., vol. 1, p. 406; Murray's New Eng. Dict., vol. 2, p. 801; Am. & Eng. Encyc. of Law, 2nd ed., vol. 6, p. 521 *et seq.* This was not in any sense a confession; it was an exculpation of the woman by herself, and an inculcation of her husband, not in his presence. If she

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had been tried alone, it would not have been receivable. Section 592 of the Criminal Code is the only statutory provision; it leaves the law where it was. There is no authority for the admission of a statement *quâd* statement: 1 Hale P.C., p. 585. Nothing is admissible but a confession: 2 Hawkins P.C., pp. 594, 595; 2 Brett's Commentaries on the Laws of England, p. 854 (substitutes allowed by law for ordinary modes of proof); Stephen's History of Criminal Law, pp. 446-7. Where is there any rule for the admission of anything which is not a confession? In *Rex v. Jones* (1827), 2 C. & P. 629, there was an admission that the prisoner cut the victim's throat, but it was qualified. *Robinson v. Robinson* (1858), 1 Sw. & Tr. 362. *Rex v. Hearne* (1830), 4 C. & P. 215, and *Rex v. Clewes* (1830), *ib.* 221, are also distinguishable. There is no anterior authority for any of the modern cases which seem to warrant the admission of anything broader than a confession: see *Rex v. Fletcher* (1829), 4 C. & P. 250; *Barstow's case* (1831), 2 Lewin C.C. 110; *Rex v. Higgins* (1829), 3 C. & P. 603; *State v. Carson* (1892), 36 S. Car. 524; *Finn v. Commonwealth* (1827), 5 Randolph (Va.) 701; *State of Iowa v. Jones* (1871), 33 Iowa 9; *People v. Parton* (1875), 49 Cal. 632; *State v. Red* (1880), 53 Iowa 69; *People v. Velarde* (1881), 59 Cal. 457; *Covington v. State of Georgia* (1887), 79 Ga. 687; Am. & Eng. Encyc. of Law, 2nd ed., vol. 9, p. 5. It was an unfair way to let in evidence. Apart from this statement there was evidence from which a jury might infer that both were guilty, but no evidence upon which the jury could properly acquit the wife and convict the husband. A prisoner should not be prejudiced in his defence: *Regina v. Coleman* (1898), 30 O.R. 93; *Regina v. Corby* (1898), 30 Nova Scotia 330; *Regina v. Gardner* (1862), 9 Cox C.C. 332.

Upon the second point, the provision of the Criminal Code is sec. 661, sub-sec. 2. In *Regina v. Connolly* (1894), 25 O.R. 151, a doubt was expressed as to reserving a case upon such a point. As to the order of addresses, see *Morin v. The Queen* (1890), 18 S.C.R. 407; *Brisebois v. The Queen* (1888), 15 S.C.R. 421. The right of reply, apart from the statute, where the prisoner calls no witnesses, exists only where the Attorney-General or Solicitor General represents the Crown: *Regina v.*

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Taylor (1859), 1 F. & F. 535; *Regina v. Gardner* (1845), 1 C. & K. 628; Encyc. of Laws of England, vol. 11, p. 246; *Regina v. Beckwith* (1858), 7 Cox C.C. 505; *Regina v. Christie* (1858), *ib.* 506. Even under the Criminal Code, the prisoner has the right, where he calls no witnesses, to go last to the jury. No person can, in fact or law, represent the Attorney-General. See *Regina v. Le Blanc* (1893), 13 C.L.T. Occ. N. 441, 29 C.L.J. 729, 6 Can. Crim. Cas. 348; Taschereau's Criminal Code, p. 757. The prosecuting counsel acts for the Crown, not for the Attorney-General: Encyc. of Laws of England, vol. 1, p. 406; *Rex v. Austen* (1821), 9 Price 142; Am. & Eng. Encyc. of Law, vol. 23, pp. 346, 366, vol. 3, p. 484; Reeve's Hist. of Eng. Law, vol. 4, ch. 25; *Julian v. State* (1889), 122 Ind. 68.

J. R. Cartwright, K.C., for the Crown. The statement was admissible as a confession: see *Maudsley's Case* (1830), 2 Lewin C.C. 110, and the other cases following on the same page: *Regina v. Blackburn* (1853), 6 Cox C.C. 333. It was not a statement that did not incriminate Ethel Martin; it did incriminate her. It was material evidence against her that she was there when the deed was done. See *State v. Dodson* (1881), 16 S. Car. 453; Roscoe's Criminal Evidence, 12th ed., pp. 45-48; Russell on Crimes, 6th ed., vol. 3, p. 523 *et seq.*

There can be no counsel for the Crown unless that counsel acts for the Attorney-General and under his direction. The right of reply is well established: Russell on Crimes, vol. 3, 5th rule (1837), and note giving cases. It is not to be supposed that the proviso to sec. 661 takes away an existing right.

Hassard, in reply.

January 23. Moss, C.J.O. (after stating the facts as above):—The questions raised were fully and ably argued from the prisoner's point of view by Mr. Hassard. But a review of the authorities leads me clearly to the conclusion that the learned Chief Justice's rulings were right.

No objection was made to the reception of Mrs. Martin's statement on the ground that it was not properly made to and received by Mrs. Whidden. But it was urged that it was not a confession in law, *i.e.*, that it was not a voluntary statement or admission of participation in a crime, so as to entitle the

Crown to give it in evidence, even as against the person making it. This point was not expressly taken before the learned Chief Justice. The objection as stated by counsel at the trial was as follows: "Just at this stage will come up the objection Mr. Hassard and I take to this evidence going in. I am quite prepared to admit that anything she said after proper caution would be evidence against herself, but certain things may be said by Mrs. Martin in the absence of her husband which I submit can hardly be used as evidence against him." And the form of the question submitted shews that what is sought from this Court is an opinion as to the validity of the objection raised to the admissibility of the statement when the prisoners were tried together. It was assumed that if Mrs. Martin was being tried alone the statement was receivable, but it was sought to exclude it because it might contain something prejudicial to her husband, who was being tried with her on the same indictment.

Assuming, however, in favour of the prisoner that the point is open, it cannot prevail. The question must be considered in the light of sec. 592 of the Criminal Code, which enables the prosecutor to give in evidence any admission or confession or any other statement of the accused. It can serve no useful purpose to enter upon an inquiry as to the exact significance of the different words of the section, or to undertake to say whether the words spoken by the female prisoner are to be termed an admission or a confession or a statement. Any of these is permitted to be given in evidence by the prosecutor. And in order to the admissibility of a statement made by an accused person, it need not appear that it is a full acknowledgment of guilt so as to be a confession in the strictest sense of the term. If it connects or tends to connect the accused, either directly or indirectly, with the commission of the crime charged, it cannot be excluded on the ground that it is not a plenary confession. It is for the jury or other tribunal to judge of its weight, and to deal with it as with any other piece of evidence, having regard to the other circumstances of the case as given in evidence: *Rex v. Clewes*, 4 C. & P. 221 at p. 226; *Rex v. Steptoe* (1830), *ib.* 397.

In the present case, it having been shewn that the statement

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was made under conditions that rendered it in law clearly admissible against the female prisoner, the learned Chief Justice could not have declined to permit it to be given in evidence.

That being the case, it was the right of the female prisoner to insist that the statement should be presented as a whole. The words with which the prisoner had opened: "They say I killed my baby. I did not kill it but I saw it killed:" which had been allowed to be given in evidence before the objection was taken, if left unexplained would manifestly have been prejudicial to her, and she was entitled to have all that followed presented to the jury. The confession or statement, if sought to be proved at all, must be proved as made. Eminent Judges have not considered the apparent hardship of this rule, where the confession or statement in its terms affects other prisoners and implicates them by name, a sufficient reason for omitting their names or any other part of the confession or statement. In *Barstow's Case*, 1 Lewin C.C. 110, Parke, J., did direct the omission of the names of other prisoners implicated by a statement proved to have been made by one, observing that he knew that Littledale, J., was of the contrary opinion, but he did not like it; he did not think it was fair. But he appears to have been singular in this respect.

In *Rex v. Fletcher*, 4 C. & P. 250, 1 Lewin C.C. 107, which was the case to which Parke, J., referred in *Barstow's Case*, two persons were indicted. A letter was tendered in evidence written by one of them, but it immediately implicated the other. It was objected by the prisoner's counsel that on reading the letter the names of all persons except the prisoner's own should be omitted. But Littledale, J., declined to so direct, and said: "There has been much doubt upon this point; and on one of the circuits the practice has been to omit the names. I have, however, considered it a good deal, and, though my opinion was once different, I am now satisfied that to make it evidence the whole of the letter must be read. But I shall take care to make such observations to the jury as will prevent it having any injurious effect against the other prisoners; and I shall tell the jury that they ought not to pay the slightest attention to this letter, except so far as it goes to affect the person who wrote it."

In *Hall and Ritson's Case* (1833), 1 Lewin C.C. 110, the two prisoners were tried together before Alderson, J. A question similar to that in the two previous cases having arisen, the learned Judge's attention was called to the differing opinions. He adopted that of Littledale, J., and ordered the whole of the examination of one of the prisoners to be read, though it directly implicated the other.

A similar ruling was made by Denman, C.J., in *Foster's Case* (1833), 1 Lewin C.C. 110. And the present rule may be stated as in Phipson on Evidence, 3rd ed., p. 231: "As in the case of admissions, the whole confession must be taken, even though containing matter favourable to the prisoner; but the jury may attach different degrees of credit to the different parts. So, if the confession implicate other prisoners, it will still be receivable, though the Judge should warn the jury that it is only evidence against the maker."

This rule, which was implicitly observed by the learned Chief Justice, must now be taken to be too firmly established to be disturbed.

In my opinion, the first question should be answered in the affirmative.

The solution of the second question depends upon the proper construction to be given to sec. 661 (2) of the Criminal Code, read in connection with sec. 3 (b), which declares that the expression "Attorney-General" means the Attorney-General or Solicitor-General of any Province of Canada in which any proceedings are taken under the Code.

In England the Attorney-General's right of reply was never seriously questioned: Norton-Kyshe on the Law and Privileges relating to the Attorney-General and Solicitor-General of England, p. 128. That was because, as was said by Baron Channell, the right is in the nature of a prerogative right, a right on the part of the Crown exercised by the officer of the Crown, the Attorney-General: *Rex v. Dixblanc* (1872), 2 State Trials N.S. 1021. The right of the Solicitor-General was not so freely conceded. However, by resolutions of the Judges, adopted prior to the Spring Circuits of 1837, it was declared that in cases of public prosecutions for felony instituted by the Crown, the law officers of the Crown and those who represent

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them are in strictness entitled to the reply, although no evidence is produced on the part of the prisoner: 7 C. & P. 676, 677, 2 State Trials N.S. p. 1020. A consideration of the numerous cases which are to be found in the reports, shews that the Crown's right of reply was not in question. The dispute was as to the persons by whom the right was exercisable. Lord Chief Baron Kelly in *Rex v. Waters* (1870), noted in 2 State Trials N.S. 1021, explained the matter as follows: "The true ground is this, that the Crown by its prerogative from time immemorial has claimed the right, and whether the Attorney-General appears in person, or, by reason of accident or other cause, does not appear, and is personally represented by some other gentleman (whither the Solicitor-General, a Queen's counsel, a serjeant, or an ordinary barrister, is utterly immaterial), the Crown does possess the right, and the counsel is entitled to exercise it if he thinks fit." He added; "No Judge who has ever filled the office of Attorney-General has ever doubted it; having had occasion to look into precedents, and to consider the principles upon which the right really rests, no one who has for any length of time filled either of the chief law offices of the Crown has ever entertained a doubt upon it." The controversy may be said to have turned altogether upon whether the exercise of the Crown's right should be allowed to others than the Attorney-General. In 1884 the Judges of England resolved that the right should be confined to the Attorney-General and Solicitor-General when personally present: 5 State Trials N.S. 3 (note c). And this appears to be the rule in England at the present day.

By 32 & 33 Vict. ch. 29 (D.), relating to procedure in criminal cases, sec. 45 (2), providing for the manner in which addresses to the jury should be regulated, it was, amongst other things, enacted that "the right of reply shall be according to the practice of the Courts in England; provided always, that the right of reply shall be always allowed to the Attorney or Solicitor-General, or to any Queen's counsel acting on behalf of the Crown." Unquestionably by the right of reply thus accorded was meant the Crown's right of reply, which had always been exercisable in Crown cases by the Attorney-General of England. The right or privilege thus conferred upon the Attorney-General

or Solicitor-General or any Queen's counsel acting on behalf of the Crown, was the right to reply after all addresses had been delivered on behalf of the accused.

All question as to the effect of the accused having adduced no evidence was excluded by the distinct and imperative language of the proviso. And so by sec. 661 (2) of the Code it is provided that the right of reply shall be always allowed to the Attorney-General or Solicitor-General or to any counsel acting on behalf of either of them. Here as in the preceding Act there is no uncertainty as to the right of reply that is to be allowed. Nor is there any doubt as to the persons by whom it may be exercised. Instead of being restricted to the law officers of the Crown and Queen's (or King's) counsel acting on behalf of the Crown, it is now extended to any counsel representing either of these law officers. In effect the provision establishes a rule identical with the resolution of the Judges of England adopted in 1837 to which reference has already been made. It is true that the preceding portions of the enactment appear to be pointed at giving to counsel for an accused person on whose behalf no witnesses are examined, the privilege of addressing the jury last. Yet this must be considered in the light of the long well understood meaning of the Crown's right of reply. As before pointed out, there never was any question as to the Crown's right of reply. The only question was as to the persons by whom it might be exercised on behalf of the Crown. And sec. 661 (2) settles that by designating those to whom it shall be accorded.

The right exists if insisted on. Until Parliament sees fit to withdraw it, the Crown through its representative can assert the privilege. And it must be left to counsel, in the judicious exercise of his discretion, to decide whether he will claim it.

In my opinion the second question should also be answered in favour of the Crown.

OSLER, J.A. (after stating the facts):—The evidence of Whidden and the learned Judge's charge were made part of the case.

I am of opinion, notwithstanding Mr. Hassard's able argument, that both questions must be answered adversely

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to the prisoner. Had the first been *res integra*, I should have been disposed to qualify the admission of Whidden's evidence, to the extent of excluding all mention of the prisoner's name, a course which seems to have had the approval of at least one Judge among the numerous decisions cited to us on the subject. But the law and practice of the Courts seem now to be settled the other way by a great preponderance of authority. The whole of the confession, verbal or written, must go in, that which implicates the party making it as well as that which excuses him must go in, though the latter may seem to implicate another prisoner who is being jointly tried with the former: Russell on Crimes, 5th ed., vol. 3, pp. 492-3; *Rex v. Fletcher*, 4 C. & P. 250; *Rex v. Clewes*, 4 C. & P. 221, 225; Archbold's Cr. Pl. & Ev., 22nd ed., p. 311; Roscoe Cr. Evid., 11th ed., p. 50; 6 Am. & Eng. Encyc. of Law, 2nd ed., p. 572.

"We must follow the old authorities and precedents in criminal matters:" *per* Coleridge, C.J., in *Regina v. Sowerby*, [1894] 2 Q.B. 173, 175. "For several reasons . . . we should not depart from these adjudged cases, but chiefly from the inconvenience of altering and overturning settled determinations. It is best, *stare decisis*. The overturning settled determinations would be of very bad consequence. They ought not to be shaken:" *per* Lord Mansfield in *Rex v. Inhabitants of Underbarrow and Bradley-Field* (1766), Burr. Sett. Cas. 545, at p. 548.

"Whatever might have been my opinion had this been a new case, I must hold myself bound by decided cases:" Lord Kenyon, *Cross v. Glode* (1797), 2 Esp. 574.

The confession is, of course, no evidence against any one but the person making it, and it is the duty of the trial Judge, a duty carefully performed in the present instance, to warn the jury not to pay the slightest attention to it, except so far as it goes to affect such person. But, though this appears to be law, it is impossible not to feel that such a confession must inevitably have its effect upon the minds of the jury, especially where it may seem to fit in with, or explain, evidence affecting the other prisoner: Archbold's Cr. Pl. & Evid., 22nd ed., p. 311; and the plainest principles of justice require that when it is

intended by the Crown to make use of such a confession the prisoners should be tried separately: *The Queen v. Weir* (1899), 3 Can. Cr. Cas. 351. I do not know whether in this case the prisoners knew that the Crown intended to use the confession of the wife. If they did not, the husband had no opportunity of making an application for a separate trial: *Encyclopædia of Pleading and Practice*, vol. 19, p. 520, "Separate Trials."

I am aware that it rests very much in the sound discretion of the trial Judge to grant or refuse the application, and that in one such case it was refused: *Regina v. Blackburn* (1853), 6 Cox C.C. 333; see also *Regina v. Littlechild* (1871), L.R. 6 Q.B. 293, 295; *Regina v. Bradlaugh* (1883), 15 Cox C.C. 217.

But the circumstances of the present case were such—I am referring to the confession—that I can hardly conceive that a separate trial would have been refused, had there been an opportunity of making it at the proper time.

The determination of the second question, viz., whether the Crown or its representative has the right of reply when no evidence has been adduced on the part of the prisoner, depends upon the proper construction of sec. 661 (2) of the Criminal Code, and upon this the numerous English cases upon the subject are of little, if any, assistance. These are collected in a valuable little work by Mr. Norton-Kyshe on the Laws and Privileges relating to the Attorney-General and Solicitor-General of England (1897). And see 7 C. & P. 676, 677, resolutions of the Judges, 1837, No. 5: "In cases of public prosecution for felony, instituted by the Crown, the law officers of the Crown, and those who represent them, are, in strictness, entitled to the reply, although no evidence is adduced on the part of the prisoner." This is also noted in 2 State Trials N.S. 1, App. E. p. 1020, where many of the cases are cited; and see 5 State Trials N.S. 3, note (c), where a later resolution will be found, passed at a meeting of the Judges held in December, 1884, "That in those Crown cases in which the Attorney-General or the Solicitor-General is personally engaged, a reply, where no witnesses are called for the defence, is to be allowed as of right to the counsel for the Crown, and in no others." There had been considerable

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diversity in the practice, but Judges to whose opinion great weight must be attached had laid it down that the right existed in favour not only of the Attorney-General himself but of those who represented him, and that the true ground of its exercise was that it had been the prerogative of the Crown from time immemorial.

In this country the Crown's right of reply has long been regulated by statute. The Criminal Law Procedure Act of 1869, 32 & 33 Vict. ch. 29, sec. 45, sub-sec. 2 (D.), provided that counsel for the prosecution, if the defendant did not, at the close of the case for the prosecution, announce his intention to adduce evidence, might then address the jury a second time for the purpose of summing up the evidence; the accused or his counsel was then to open his case and sum up the evidence, if any adduced for the defence: "and the right of reply shall be according to the practice of the Courts in England; provided always, that the right of reply shall be always allowed to the Attorney-General or Solicitor-General, or to any Queen's counsel acting or behalf of the Crown." This practically introduced the English rule of 1837, though if the Crown was not represented by the Attorney-General or Solicitor-General, the right of reply was confined to a Queen's counsel, and could not be exercised by counsel of lower rank.

The Criminal Code, sec. 661, sub-sec. (1), now provides that accused or his counsel shall, at the end of the case for the prosecution, declare whether he intends to adduce evidence. If he does not so announce, the counsel for the prosecution may address the jury by way of summing up. Sub-sec. 2: Upon every trial the accused shall be allowed to open his case, to examine his witnesses, and when all the evidence is concluded to sum up. The difficulty is caused by the remainder of this sub-section:—"If no witnesses are examined for the defence the counsel for the accused shall have the privilege of addressing the jury *last, otherwise* such right shall belong to the counsel for the prosecution. Provided, that the right of reply *shall be always* allowed to the Attorney-General or Solicitor-General or to any counsel acting on behalf of either of them." There would seem at first sight to be a conflict between the two parts of this clause. The latter, however, contains an express

provision dealing with the case of the Attorney-General and Solicitor-General and counsel acting on behalf of either of them, which, in the case of prosecutions in this Province, where there is no Solicitor-General, must apply to counsel acting for the Attorney-General at the Assizes or other Court where such counsel receives his instructions to act from the Attorney-General. There are many prosecutions which are conducted by the County Attorney at the Sessions or the County Judge's Criminal Court or the Speedy Trials Court, where he acts upon the authority conferred upon him by his office, and is not in any sense the representative of the Attorney-General. In these the first branch of the clause may well apply, and the two provisions may then be reconciled without doing violence to either. I think, therefore, that the Crown represented by counsel acting on the instructions of the Attorney-General had here the right of reply, and that the trial Judge properly so ruled.

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MACLAREN, J.A.:—Counsel for the accused Alexander Martin devoted a considerable portion of his argument before us to establishing that what Mrs. Martin said to the police matron Mrs. Whidden, was not really a confession, not being an admission of guilt on her part, but merely a statement incriminating her husband; and that, consequently, it should not have been received in evidence. In support of this proposition he quoted the definition of the word "confession" from several dictionaries, and cited a number of cases to the same effect.

The first point to be considered is, whether the evidence would have been admissible if Mrs. Martin alone had been on trial. The section of the Code bearing on this point is 592, which reads as follows: "Nothing herein contained shall prevent any prosecutor from giving in evidence any admission or confession, or other statement, made at any time by the person accused or charged, which by law would be admissible as evidence against him."

Under the law before the enactment of this section a confession or admission relevant to the issue, and adverse to the interest of the accused who made it, might be given in evidence against him, if it was not obtained by threat or

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inducement. If made before a magistrate at a preliminary examination, it was further necessary that the accused should have been cautioned.

The admissions made by Mrs. Martin to Mrs. Whidden were made without any threat or promise, and were not even made in answer to questions; but were perfectly free and voluntary. Further they were made after she had been cautioned by Mrs. Whidden that anything she would say might be used against her. They were relevant to the issue on two grounds; (1) they shewed her presence at the commission of the crime; and (2) they furnished a possible motive for the commission of the crime, by shewing that the child was a burden to her, and that she had been anxious and endeavouring to place it in some institution that she might not be prevented from earning money.

If any part of her admission had been tendered, she would be entitled to have her whole statement put in just as it was made, in order that she might get the benefit of any part of it that would make in her favour.

When such a statement affects not only the person who made it, but also another person who is being tried at the same time, and who was not present when it was made, a more serious question arises. Of course, the confession or admission cannot be evidence except against the party who made it. In order to prevent its influencing the jury against any other prisoner named in it, some English Judges were accustomed to direct that the names of such other persons should be omitted. This practice, however, never became general, and was found to be objectionable and inconvenient, and appears to have been finally abandoned, it being considered that the direction to the jury that such a confession or statement was not evidence except against the person who made it, was a sufficient protection to other prisoners. See *Rex v. Hearne*, 4 C. & P. 215; *Rex v. Clewes*, *ib.* 221; *Rex v. Fletcher*, *ib.* 250, 1 Lewin C.C. 110.

Even if the practice of omitting the names of others were still followed, it is impossible to see how such omission could have been of any advantage to Martin in this case; as from the nature of the statement the jury would have been fully aware that he was the person referred to by Mrs. Martin.

Before the statement of Mrs. Martin was given in evidence, the learned Chief Justice very pointedly called the attention of the jury to the legal effect of such evidence. His words were: "I tell you in advance now, gentlemen, so that you may keep it in your minds clearly, that I cannot exclude this evidence, because it is evidence against the person who uttered it; but it is not evidence against the husband. He was not there, and the admission or confession of one person accused of crime in a case like this is not evidence against the other. I shall tell you that again later when I come to charge you, but I cannot exclude the evidence now."

Subsequently in his charge he carefully instructed the jury to the like effect, referring to the matter no less than three times; thus doing all in his power to prevent the statement from injuriously affecting or prejudicing the case of the husband.

The course pursued by the trial Judge was, in my opinion, quite correct. If the defence had been aware of the admission of the wife, and that it was likely to be used, it is probable that the husband would have asked leave to sever in his defence, and the difficulty above pointed out would no doubt have been duly weighed in considering such an application, as it is quite manifest how difficult it must be for a jury to prevent such a statement as the one in question from influencing their minds against the other prisoner.

This, however, is not the present case. The sole question is the admissibility of the statement when the prisoners were being tried together. I do not think it could have been excluded.

There remains the further question whether the counsel representing the Attorney-General had the right of reply, notwithstanding the fact that no evidence was offered on behalf of either defendant.

Our law on this point is found in sec. 661 of the Criminal Code, sub-sec. 2 of which reads as follows:—"Upon every trial for an indictable offence; whether the accused person is defended by counsel or not, he or his counsel shall be allowed, if he thinks fit, to open his case, and after the conclusion of such opening to examine such witnesses as he thinks fit, and when

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all the evidence is concluded to sum up the evidence. If no witnesses are examined for the defence the counsel for the accused shall have the privilege of addressing the jury last, otherwise such right shall belong to the counsel for the prosecution: Provided, that the right of reply shall be always allowed to the Attorney-General or Solicitor-General or to any counsel acting on behalf of either of them."

By sec. 3 (b) of the Code, the expression "Attorney-General" means the Attorney-General of the Province, and it is not disputed that in the present case Mr. Proudfoot was acting on behalf of the Attorney-General of Ontario.

The first sub-section of sec. 661 and the first sentence of the second sub-section, above quoted, are substantially a reproduction of sec. 2 of the Imperial Act 28 Vict. ch. 18. The difficulty in interpreting it arises from the additions made. It is noticeable that while in England the right of reply, in case no evidence for the defence is adduced, is restricted to the Attorney and Solicitor-General *personally* by the resolutions of the Judges in 1884, the Code in 1892 gave it in addition to any counsel acting on behalf of either of them. Before that time in Canada it was restricted under sec. 45 of the Criminal Act of 1869, and R.S.C. 1886, ch. 174, sec. 179, to these law officers and to Queen's counsel acting on behalf of the Crown.

The right of the Attorney-General to the reply in such cases had been for centuries conceded by the English Judges as one of the royal prerogatives. Some of them thought it an objectionable practice and confined it to the Attorney-General in person, while others extended it to the Solicitor-General, and others to any counsel acting for the Crown in a public case. This latter course was adopted as to prosecutions for felonies by a resolution of the Judges, in November, 1836, and continued until changed in 1884 as above stated.

In my opinion, the trial Judge ruled properly in his interpretation of sec. 661. It is a relic of absolutism and high prerogative, and, while it stands on the statute-book, the representative of the Attorney-General has a right to claim it, and when he does so, the Judge must allow it.

In the meantime I think it should be claimed only when

there are special reasons for doing so, and that it would be more in consonance with modern enlightened ideas as to the relative rights of the Crown and the subject if it were entirely abrogated.

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MACLENNAN and GARROW, JJ.A., concurred.

E. B. B.

[TEETZEL, J.]

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RE POWELL AND THE LAKE SUPERIOR POWER COMPANY.

Jan. 7.

Arbitration and Award—Non-compliance with Direction of the Court—Refusal to State a Special Case—Bonâ fide Application—Remittal to Arbitrator—R.S.O. 1897, ch. 62, sec. 12, sub-sec. 2, sec. 41.

On a motion to set aside an award :—

Held that an arbitrator to whom an award had been remitted “to find and make his award as to the ownership” of certain property had not complied with that direction by *vesting* the property in one of the parties as owner.

Held, also, that, an application having been made *bonâ fide* to him before the award was signed, to state certain questions of law in a special case for the opinion of the Court; or to adjourn the matter until an application to the Court to direct him to state a special case had been disposed of, his refusal to do so was a ground for remittance to him for further consideration.

In re Palmer & Co. and Hosken & Co., [1898] 1 Q.B. 131 followed.

THIS was a motion by The Lake Superior Power Company to set aside an award, which was argued in Weekly Court, on the 8th of December, 1904, before TEETZEL, J.

Douglas, K.C., and *S. C. Wood*, for the motion. The first award made by the arbitrator in this matter was remitted to him to amend, and he was directed “to find and make his award as to the ownership of certain property” included in a certain instrument. He has by his award *vested* that property in the company which he had no jurisdiction to do: *Redman’s Arbitrations and Awards*, 4th ed., pp. 180, 267, 268; *Russell on Awards*, 8th ed., p. 299. He was requested to state certain questions of law in a special case for the opinion of the court before he made his award, and he unreasonably refused to do so, even after he was served with a notice of motion for an order directing him so to do: R.S.O. 1897, ch. 62, sec. 4. He was guilty of misconduct in so acting: sec. 12, sub-sec. 2; *In re Palmer & Co. and Hosken & Co.*, [1898] 1 Q.B. 131.

G. H. Watson, K.C., *contra*. The arbitrator was directed to “ascertain the ownership” of the property; he has done so by *vesting* it in the company—that settled the ownership. When the first award was sent back it was to be amended in one particular only, and a statement of legal points in a special case for the court would be inconsistent with such limitation. I

refer to *Lemay v. McRae* (1888), 16 O.R. 307; (1889), 16 A.R. 348; (1890), 18 S.C.R. 280; *Re Gillon v. The Mersey & Clyde Navigation Co.* (1832), 3 B. & A. 493; *Harrison v. Lay* (1863), 13 C.B.N.S. 528; *McGill v. Proudfoot* (1846), 4 U.C.R. 40; *Williams v. Lewis* (1857), 7 E. & B. 929; *The Thames Iron Works & Shipbuilding Co. v. The Queen* (1869), 20 L.T.N.S. 318; *Falkingham v. Victorian Railways Commissioner*, [1900] A.C. 452; *Re Montgomery Jones & Co. and Liebenhal & Co.* (1898), 78 L.T.N.S. 406; *Re The Grand Trunk Railway of Canada and Petrie* (1901), 2 O.L.R. 284; *Re Nuttall and The Lynton & Barnstaple R.W. Co.* (1900), 82 L.T.N.S. 17; *The Rathbun Co. v. The Standard Chemical Co.* (1903), 5 O.L.R. 286, at p. 295. In *In re Palmer & Co. and Hosken & Co.*, [1898] 1 Q.B., 131, the granting of a special case by the arbitrator was a question of discretion.

Douglas, in reply, referred to *McRae v. McLean* (1853), 2 E. & B. 946; *Johnson v. Latham* (1851), 20 L.J.Q.B. 236, at pp. 239, 240.

January 7. TEETZEL, J.:—Motion by The Lake Superior Power Company to set aside an award.

The grounds chiefly relied upon in argument were the following: (1) Misconduct on the part of the arbitrator in refusing on the 15th July, 1904, upon a special application made to him to state a special case for the opinion of the court upon certain questions of law, and in proceeding with the reference, after the service upon him of a notice of motion to the court for an order calling upon him to state in the form of a special case for the opinion of the court the said questions of law arising in the course of the reference; and pending the motion to the court making his further or amended award herein. (2) That the arbitrator exceeded his authority in said award, in that by the same he vested in the said Power Company the goods, chattels, and property referred to and included in a document dated 5th January, 1901, as the owner thereof; and that he exceeded his jurisdiction in presuming to control the ownership of said property by vesting it in either party to the submission. (3) The award is uncertain in declaring that the said company were the mortgagees under the said document and were at the

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same time the owners of the property therein described, and in not determining or stating why and in what manner the said company became the owner of the said property, or why and in what manner or for what reason the said arbitrator presumed to vest the said property in the company.

The agreement of reference provides that the submission shall be conducted under the provisions of R.S.O. ch. 62 (1897).

The original award was dated December 9th, 1903, and upon a motion to set the same aside, an order was made by the Honourable the Chief Justice of the Common Pleas on June 22nd, 1904, remitting the award to the arbitrator, "for the purpose of finding and making his award as to the ownership of the property, which was included in the instrument of 5th January, 1901, and which entered into the figures which the arbitrator has set out in the award, and which form the amount found due from the power company to Powell & Mitchell," and directing such further award to be made on or before August 1st, 1904.

Pursuant to this order, the arbitrator on the 16th July, 1904, amended and re-executed the award, the amendment being in the following words and figures: "3 (4) I further award and determine that the goods, chattels, and property referred to and included in the document dated the 5th of January, A.D. 1901, before mentioned be hereby vested in The Lake Superior Power Company, as the owner thereof."

On the 15th July, 1904, counsel for the power company, pursuant to notice and in presence of counsel for Powell & Mitchell, applied to the arbitrator to state in the form of a special case, for the opinion of the court, certain questions of law, which had arisen during the reference, but this the arbitrator refused to do, whereupon counsel for the company requested the arbitrator to delay making his award, until the company could apply to the court for a direction to him to state such case, but this the arbitrator also refused to do and intimated that he would proceed on the following day to make his award.

On the following day, July 16th, counsel for the company again appeared before the arbitrator and served him with a copy of a notice of motion to the court for a direction to state

such case, and again requested the arbitrator to delay making his award until the application had been heard, and again the arbitrator refused to grant the delay, and proceeded to make and execute the amended award.

From the best consideration I have been able to give the material filed on this application, I am of opinion, that the application made by the company to the arbitrator was *bond fide* and reasonable and was not frivolous or made for the purpose of delay only, and that a reasonable time should have been given to enable the company to have its application to the court for a direction to state a special case disposed of by the court.

When the notice of motion did come before the court, it was dismissed on the ground as stated in the argument, that after an award is actually executed, an order will not be made directing the arbitrator to state a special case.

Section 41 of ch. 62, R.S.O. 1897, provides that an arbitrator may at any stage of the proceedings, under a reference, and shall, if so directed by the Court or a Judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference; but it appears to be well settled, that, if the arbitrator when applied to refuses to state a special case and proceeds to execute his award, the court will not, while the award stands, remit to the arbitrator to state his award in the form of a case: Redman's Arbitrations and Awards, 4th ed., 255.

His refusal to state a special case, however, may be a ground for setting the award aside: *In re Palmer & Co. and Hosken & Co.*, [1898] 1 Q.B. 131. In that case Lindley, M.R., at p. 137, in speaking of this right of a party to have a special case stated by the arbitrator, says, "The right thus conferred must be respected by the arbitrator; and if a party to an arbitration, acting *bond fide*, requests an arbitrator either to state a special case, raising a question of law, arising in the course of the reference and material for consideration, or to delay his award until the party can apply to the court for an order directing a special case, and the arbitrator refuses to comply with either of such requests, the arbitrator is *prima facie* at all events guilty of a breach of duty towards such party." The judgment

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proceeds to hold that such breach of duty is ground for setting aside, under sec. 11 of the English Act which corresponds with sec. 12, sub-sec. 2 of ch. 62, R.S.O. 1897, or for remitting it to the arbitrator for reconsideration.

In my view of the facts of this case I think that upon the authority of *In re Palmer & Co. and Hosken & Co.*, the award should be remitted to the arbitrator for reconsideration, under sec. 11 of ch. 62, R.S.O. The agreement of reference contains the following clause: "And it is further agreed that if motion is made to set aside or otherwise respecting the award, the court may, whether the award be insufficient in law or not, remit the award from time to time to the reconsideration and redetermination of the arbitrator."

I further think the arbitrator did not comply with the terms of the order of June 22nd, 1904. That order required him to find and award as to the ownership of the property included in the instrument of 5th January, 1901, and without determining whether he has the power to vest the property in one party or the other, I am of the opinion that he does not satisfy the terms of the order by awarding and determining that the said property "be hereby vested in The Lake Superior Power Company as the owner thereof." And for this additional reason, I think the award should be remitted to the arbitrator for reconsideration.

I express no view upon the other grounds set forth in the notice of motion.

There will be no costs to either party. The award to be made on or before the first Monday in April next.

G. A. B.

[MEREDITH, C.J.C.P.]

THE MERCHANTS FIRE INSURANCE COMPANY

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Jan. 7.

THE EQUITY FIRE INSURANCE COMPANY.

Fire Insurance—Goods in Existence at Time of Fire—"120 Sacks of Green Coffee"—Termination of Insurance—Notice of—Variation in Limitation Condition—Unreasonableness.

Where a policy of insurance against fire was effected by the owners, wholesale dealers in coffee, etc., on "120 sacks of green coffee" stored in a specified warehouse, and which policy was a renewal of a similar insurance in force for some years :—

Held, that such insurance was not limited to the particular 120 sacks on hand when the policy was effected, but covered similar stock to the specified number of sacks in hand at the time of a fire which subsequently occurred.

About a week before the fire occurred the insured wrote to the company's local agent that they decided to cancel the existing policy and to have a new one issued for a reduced amount, but this was never communicated to the head office, or any action taken upon it until after the fire had occurred :—

Held, that this was not such written notice terminating the insurance as was required by 19a of the statutory conditions, being merely an intimation of the insured to have the existing policy cancelled when a new one was substituted for it, but which was never carried out.

A variation of statutory condition 22 reducing the time for bringing an action to six months is an unjust and unreasonable condition.

THIS was an action tried before MEREDITH, C.J.C.P., sitting without a jury, at Toronto, on 15th November, 1904.

The facts, so far as material, appear in the judgment.

R. C. Levesconte, for the plaintiffs.

B. Morton Jones, for the defendants.

January 7. MEREDITH, C.J.:—This action is brought on a policy of insurance issued by the defendants, dated the 1st April, 1902, reinsuring the plaintiffs for one year to the amount of \$1,000 on, as stated in the policy, "property covered by its (*i.e.*, the plaintiffs') policy No. 2958 issued at its Brantford agency in favour of the Snow Drift Company of Brantford for the sum of \$2,000."

Policy No. 2958 of the plaintiffs bears date the 24th February, 1899, and was for a term of one year. The property insured is described in it as "120 sacks of green coffee while stored in the three-story brick, patent roofed building occupied

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The policy was in pursuance of one of its terms renewed in each of the years 1900, 1901, and 1902.

The loss was made payable to the Bank of British North America.

The business of the Snow Drift Co. was that of wholesale dealers in coffees, spices, extracts and other articles.

The company carried insurance on its general stock for a considerable amount besides the policy on the green coffee.

The reason for effecting the insurance of the 24th February, 1899, on the green coffee was that the company had exceeded its line of credit with its bankers, the Bank of British North America, who required security, and the means adopted to give the security was the effecting of this insurance, and providing by the policy that the loss should be payable to the bank.

A fire occurred on the 18th September, 1902, which resulted in the total destruction of the whole of the company's stock-in-trade, including its green coffee.

There was some question as to the quantity of green coffee on hand at the time of the fire. Mr. Edwards, who acted as adjuster for the plaintiffs and defendants, as well as for other insurance companies interested, in settling the loss, stated in evidence that the loss on it was \$1,321 at the lowest. I am inclined to think that \$1,321 is a very low estimate, and that it is more likely that as Mr. Fullerton, who was manager of the company, testified the loss exceeded \$2,000.

There is no doubt that none of the green coffee which was in the company's premises when the insurance with the plaintiffs was effected was there when the fire occurred. It had been sold in the course of the business, months, and perhaps years before, and one of the questions in dispute is as to the proper construction of the policy—whether it is a policy on a specified 120 bags, or on any 120 bags of green coffee which might while the policy was current and at the time of the fire be on the premises mentioned in the policy, and I am of opinion that it is the latter.

If the description had been "the stock of green coffee," it is quite clear that the policy would have covered the stock on

hand at the time of the fire, though the whole of the particular coffee of which the stock consisted at the time the insurance was effected had been disposed of. Does, then, the description "120 bags of green coffee" do more than confine the subject of insurance to green coffee in bags, and limit the right to recover in respect of such a stock to the value of 120 bags, however large the stock may have been? I think it does no more than this.

It is impossible to conceive, I think, in the case of the plaintiffs' insurance which, though originally for one year, was continued in accordance with the provisions of the policy for three years longer, when the nature of the business which the Snow Drift Company was carrying on is considered, which was such that caused, if it did not require, the stock of green coffee to be turned over very frequently, that it was in the contemplation of the parties that the policy should cover only the identical 120 bags which were in stock when the insurance was effected, or a particular 120 bags of that stock.

It is true that it appears that 120 bags of green coffee were at one time separated from the rest of the stock and placed by themselves in the company's premises, but that was done only for the purpose of enabling the local manager to shew to the inspector of the bank that the company had as large a stock of green coffee in bags as had been insured for the bank's benefit.

Altogether different considerations are applicable to a description such as that in question when it is found in a policy of insurance to those which govern in the case of a warehouse receipt, and no doubt if the question had arisen as to the ownership of property so described in a warehouse receipt to which the subsequent amendments to the Bank Act were not applicable, on a similar state of facts to that which exists in this case, the holder of the warehouse receipt would not be entitled to any but the identical 120 bags which were in existence when the warehouse receipt was issued: *Llado v. Morgan* (1874), 23 C.P. 517.

Contrary to what I should have expected, I have not been able to find any reported case in which the precise question that has arisen in this case has been decided, unless it be the case of the *British America Ins. Co. v. Joseph* (1857), 9 L.C.R. 448.

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The policy sued on in that case was upon 1,600 to 1,800 "chaudrons" of coal. A fire had occurred, and 853 of these had been destroyed or damaged by it. One of the defences was that when the insurance was effected, the insured had only about 500 "chaudrons" on hand, and that these were not injured by the fire; that the insured had after the insurance was effected added to the stock a large quantity of other coal, which the defendants contended was not covered by the policy, and that the loss had been in respect of this additional quantity. This defence was ineffectual in the Superior Court, and on appeal that Court's judgment in favour of the plaintiffs was affirmed by the Court of Appeal.

I am unable to distinguish that case from this. The circumstance that the quantity of coal was in that case stated to be from 1,600 to 1,800 "chaudrons," while in this the number of bags is stated to be 120, does not, I think, having regard to the nature of the commodities, afford a ground for doing so.

Gorman v. Hand-in-Hand Ins. Co. (1877), 11 I.R.C.L. 224, is not, I think, opposed to the view I have expressed. In that case £400 was insured on "rick of hay in haggard at rear of last rear," and £200 on "smaller rick of hay in said haggard."

Chief Baron Palles, in delivering the judgment of the Court, said (p. 235): "If, for instance, the words were 'hay in the haggard'—words which might mean either *the* hay now there or *any* hay which might from time to time be there—I should hold that in such a contract as this they should receive the latter meaning," and the decision, which was against the plaintiff, proceeded upon the ground that the things insured were not only described as "ricks," which it was said was *primâ facie* a specific description, but one was described as smaller, which it was said pointed by way of comparison to another rick, which must, *ex necessitate rei*, have then been an existing thing.

The Chief Baron recognizes what I take to be clearly the rule for interpreting insurance contracts, that even though *primâ facie* the words used to describe the property insured point to a specific and then existing thing, the circumstances of the case may be such as to lead the Court which is called upon

to construe the contract to give to the words a broader and more comprehensive meaning. Speaking of the facts of the case he was dealing with, he said—making the assumption that the contract was one which entitled the insured to renew it; the further assumption that the Court must construe it though the period of renewal had not arrived as it would be construed subsequently to the renewal, and the assumption that it was within the contemplation of both parties that farmers must from year to year consume of their then present stock of hay and replace it with the produce of later years—"these considerations would in my mind be most coercive to lead us to construe the words describing the hay as pointing to hay which should from time to time answer the description, *provided they were susceptible of that construction*," and as I have already mentioned, the decision proceeded upon the ground that the words used in the policy in question there were not susceptible of the wider construction, because, as the Chief Baron thought (p. 235) "the word 'smaller' as applied to one, and the implied description of 'larger' to the other, exclude the application, if otherwise applicable, of the words used to any subject-matter but the then existing ricks."

No such difficulty stands in the plaintiffs' way in this case; and, assuming that the description in their policy is *primâ facie* a specific description, the circumstances which I have already detailed, and which shew conclusively, I think, that the contracting parties did not intend to enter into a contract of so limited a character, rebut that presumption and require me, if the words are susceptible of such a meaning, as I think they are, to construe the contract as covering any bags of green coffee to the number of 120, the property of the insured, which might be during the currency of the policy and at the time of a loss by fire happening in the premises described in the policy.

It was further argued that the insurance had been terminated by the assured by written notice to that effect before the fire occurred.

This contention was based upon the fact that the assured had, on the 10th September, 1902, written to the agents at Brantford of the plaintiffs in the following terms:—

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Messrs. Hemphill & Ferguson,
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In reference to policy 2958, in amount \$2,000, held by the Bank of British North America on 120 bags of coffee, we wish to cancel this policy and have you give us a new one for \$1,000, as there are now only 50 bags of coffee in stock.

Kindly give this your earliest attention and very much oblige,

Yours truly,

The Snow Drift Co.,
R. M. Fullerton,
M."

This letter was not communicated by the Brantford agents to the plaintiffs' head office until after the fire occurred, and no action was taken upon it either by return of the unearned premium or otherwise.

It was argued for the defendants that the writing of this letter operated as a written notice within the meaning of condition 19a of the statutory conditions,* and that the insurance was terminated immediately on the receipt of it by the Brantford agents; but I am not of that opinion.

The letter was not, I think, such a written notice as the condition relied on refers to.

It was, I think, only an intimation of the intention of the assured to terminate the insurance if and when there was substituted for it a new policy for \$1,000; to that the plaintiffs never agreed, and it was never done.

Being of this opinion, it is unnecessary to consider whether notice to the Brantford agents was notice to the plaintiffs, within the meaning of the condition.

It was also urged as an answer to the plaintiffs' claim that there had been a breach of the warranty contained in the policy sued on, that the plaintiffs would retain an amount at risk equal to that reinsured under that policy.

* 19a. The insurance may be "terminated by the assured by giving written notice to that effect to the company or its authorized agent, in which case the company may retain the customary short rate for the time the insurance has been in force and shall repay to the assured the balance of the premium paid."

I do not understand the force of this objection. The amount reinsured by the defendants' policy was \$1,000, and, as I have found, the plaintiffs had at risk up to the time of the fire not only a sum equal to that, but to double that sum.

It was contended, lastly, that as the action was not begun until more than six months after the loss occurred, it was barred, and condition number 22, as varied by the indorsement on the defendants' policy, was relied on in support of that contention.

Statutory condition number 22 allows a year after the loss has occurred in which to bring the action, and I am not only unable to hold the variation which the defendants have attempted to impose upon the assured by reducing the time allowed for bringing an action to six months to be just and reasonable, but I am clearly of opinion that on the contrary it is both unjust and unreasonable.

The result is that the plaintiffs should have judgment against the defendants for one-half the amount paid the Snow Drift Company in settlement on the loss under their policy, which was \$1,000.

There will, therefore, be judgment for the plaintiffs for \$500, with interest from the date when the claim of the Snow Drift Company was paid (15th April, 1903), and the defendants must pay the costs of the action.

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PIRUNG V. DAWSON.

Dec. 17.

Settlement of Action—Order Enforcing—O.J. Act—Jurisdiction.

Since the passing of the O.J. Act the compromise of an action will be enforced by an order of the Court, and where the motion in such case is for judgment and, analogous thereto, for judgment on the pleadings, the proper practice is by motion to a Judge in Court.

THIS was an appeal by the plaintiffs from an order of the Master in Chambers, dated 18th November, 1904, dismissing their application to him "for an order permitting" them "to enter judgment for the amount of the settlement arrived at in this action, namely \$160," together with the costs of the motion. They also moved substantively to enforce the settlement by directing judgment to be entered for the same sum with costs of the application made by them.

On November 25th, 1904, the appeal was heard before MEREDITH, C.J., C.P., sitting in the Weekly Court.

A. R. Clute, for the appellant.

Heyd, K.C., for the respondent.

December 17. MEREDITH, C.J.:—It is, I think, reasonably clear that since the Judicature Act the Court has jurisdiction to enforce in the action a compromise of it to which the parties have agreed: *Daniells' Ch. Prac.*, 7th ed., vol. 1, p. 16; *Seton on Decrees*, 2284; *Snow's Annual Prac.*, (1904), vol. 2, p. 342, and cases cited, especially *Alliance Pure White Lead Syndicate (Limited) v. MacIvors Patents (Limited)* (1891), 7 Times L.R. 599, where *Vaughan Williams, J.*, is reported to have said that he could make the order which was applied for in that case by the plaintiff to enforce a compromise, on motion according to recent authority, though before the Judicature Acts the remedy would have been by action on the agreement.

The Master in Chambers was however right, I think, in holding that he had no jurisdiction to make the order which he was asked to make, and the proper practice in such cases as

this, where the motion is one for judgment and analogous therefore to a motion for judgment on the pleadings, is in my opinion to apply to a judge in Court for such order as may be necessary to enforce the compromise.

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It may be that where the compromise is to be carried out by a stay or dismissal of the action the Master in Chambers may have jurisdiction to make the order; as to this I express no opinion; this is not a case of that kind.

It follows that in my opinion the appellant fails in his appeal, but I may, I think, treat his substantive motion as having been transferred into and heard by me in Court, and make the order for payment by the respondent of the \$160 to the appellant forthwith, and that is the order which I make.

There will be no costs to either party of the motion before me or of the proceedings before the Master in Chambers.

G.F.H.

[MEREDITH, C.J., C.P.]

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Jan. 7.

RE ATLAS LOAN CO.:

ELGIN LOAN CO.'S CLAIM.

Company—Winding up—Creditor—Validity of Claim—Right to Rank on Assets.

W. was president of the A. Loan Company, and also a member of a firm of stock brokers interested in a block of the common stock of a coal company, which it was desired to place in the hands of permanent investors. Another loan company, the E. Company, had a large savings bank account with the A. Company, and, as the E. Company contended, to enable the former company, which was empowered to invest in stocks, which the E. Company was not, to purchase a number of these shares, it was arranged, through W. that the E. Company should lend the A. Company \$55,000, the amount required for such purchase, on the security of a debenture for the amount to be issued by the A. Company; the E. Company also to hold the stock purchased as collateral security, and to be paid five per cent. interest, or, at their option, to have the dividends on the stock, and to receive one-half of any profit that might be realized on the stock when sold:—

Held, on the evidence fully set out in the case, that the transaction was a *bond fide* one, and not merely a device to enable the E. Company to invest in the stock, and that the E. Company was therefore entitled, in winding up proceedings against the A. Company, to rank as creditors on the assets of that company.

THIS was an appeal by the Elgin Loan Company from the disallowance by the Master-in-Ordinary of their claim in the proceedings to wind up the respondent company, the Atlas Loan Company to rank upon the estate of the latter in respect of a debenture of that company for \$55,000, dated the 31st May, 1902, payable to the appellant company or order on the 2nd January, 1907, with interest at the rate of five per cent. per annum, payable half-yearly, the whole being collaterally secured by three hundred and seventy-five shares of the capital stock of the Dominion Coal Company.

The appeal was heard before MEREDITH, C.J.C.P., sitting in the Weekly Court, on November 23, 1904.

W. K. Cameron, Shirley Denison with him, for the appellants.

W. H. Hunter, for the respondents.

January 7. MEREDITH, C.J.:—The learned Master-in-Ordinary came to the conclusion that, as he states, "the issue of this debenture by the Atlas Company and its acceptance by the Elgin Company was a device to enable the latter company

to invest its trust funds in unauthorized and therefore forbidden securities," and he held that the appellants were therefore not entitled to prove their claim.

What I understand to be the meaning of the finding is that the appellant company was the real purchaser and owner of the shares, and that the debenture of the respondent company was issued in order to give the transaction the form of a loan to the latter company of the money which was used to pay for the shares, in order that the investment might appear to be one that it was within the powers of the appellant company to make.

I am unable to agree with this finding.

The documentary evidence,—I mean that of the debenture, the agreement between the two companies of the 10th June, 1902, and the resolution of the directors of the appellant company authorizing the entering into of the transaction, as well as the correspondence and circumstances immediately connected with the completion of it, are in my opinion quite inconsistent with the transaction being of the character the learned Master has found it to have been.

The agreement is that not less than three hundred and seventy-five shares of the stock of the Coal Company shall be purchased by the respondent company; that the shares with the debenture on which the claim is based shall be security to the appellant company for "the amount so invested in the debenture with interest at five per cent. per annum," and that the appellant company is to have the option of demanding payment at any time of the amount of the debenture or so much of it as may be advanced, with the interest to the date of the demand.

An agreement, intended to evidence the transaction, had been forwarded by Mr. Wallace, the president of the respondent company, to the manager of the appellant company, on the 3rd June, 1902; the form of this agreement, which was not produced, was not satisfactory to the latter, who wrote on the following day to Wallace, telling him that the committee appointed to arrange the matter had gone over the agreement he had sent, and that the committee had power to carry out the agreement only as instructed by the board, and upon the basis understood by them in their meeting with him, that "we"

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Meredith, C.J. (meaning the committee) "are a little afraid the wording makes it appear that the Elgin Loan & Savings Company (the appellant company) are investing in coal and not in your debenture only" adding "no doubt this can easily be made clear."

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The money which was used to pay for the stock was the money of the respondent company, and the appellant company did not pay anything until after the debenture had been issued and delivered to it, and the agreement had been signed. It was not until the 11th August, 1902, that the money was paid, and it was paid by the appellant company drawing upon its savings bank account with the respondent company for \$52,191.25, which was done by cheque of that date, which is ear-marked, "re Debenture No. 243."

The resolution of the board of directors of the appellant company which authorized the transaction was passed on the 30th May, 1902, and is as follows:

"Mr. A. E. Wallace, president of the Atlas Loan Co., was present by appointment and explained in reference to the \$55,000 debenture which this company contemplated purchasing from the Atlas Loan Co., that although the debenture is issued for a term of five years that an endorsation would be made upon the debenture by the proper officer of the company to the effect that this company would close the transaction by having the debenture cancelled and the money repaid to the company whenever this company desired best to do so. The members having expressed their satisfaction with this explanation, Mr. Wallace withdrew."

A resolution had been passed by the board of the appellant company on the 27th of the same month, as follows:

"The manager stated to the board that he had interviewed Mr. Wallace in Toronto on Saturday, 24th instant, re the terms and conditions of the debenture for \$50,000 which he proposed to sell to this company. It was moved by Mr. Baird and seconded by Mr. Couse, that the proposition as presented by Mr. Wallace be accepted, and that the president, vice-president and manager be appointed as a committee with power to complete the transaction."

The only other resolution of the board of the appellant company relating to the transaction was passed on the 22nd May, 1902, and is as follows:

"A letter was read from Mr. A. E. Wallace, Toronto, asking an informal meeting re a proposition to sell this company a \$50,000 debenture at a fixed rate of interest with other profits in prospect in addition. The manager was instructed to communicate with Mr. Wallace asking rate of interest said debenture would bear, time it would require to run, and so forth, and also to try and fix a date on which Mr. Wallace would meet this board and notify the members of the board accordingly."

The letter referred to in this last resolution was the one from Mr. Wallace to the manager of the appellant company dated 21st May, 1902, and it is referred to and commented on by the learned Master in the reasons which he gave for the conclusion to which he came.

The following facts are not in controversy :

Wallace was, besides being president of the respondent company, a member of the firm of A. E. Ames & Co., bankers and brokers in Toronto ; this firm was interested, as members of a syndicate, in a "block" of shares of the common stock of the Dominion Coal Company, which they were desirous of placing in the hands of permanent investors and, incidentally, I judge, were interested in replacing them at a profit to themselves. The appellant company had a large savings bank balance at its credit with the respondent company, \$60,000 being at the credit of this account on the 16th April, 1902, which was increased to \$65,000 on the 24th June following ; Wallace knew that it was beyond the powers of the appellant company to invest in the purchase of the shares, and he knew that the directors of the appellant company were well aware of this ; the respondent company had power to invest in the purchase of the shares, and this was known to Wallace and to the directors of the appellant company also.

What appears to me, looking at all the circumstances disclosed in the documentary and oral testimony or such of it as can be relied on, to have been likely to have been the real arrangement between the parties, and what was, in my opinion, the arrangement that was really come to is this : That in order to enable the respondent company to buy the shares the appellant company should lend to it what was required to buy not less than three hundred and seventy-five shares ; that this

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should be advanced by the appellant company to the respondent company on the latter's debenture for \$55,000, and that the shares when purchased should be held by the appellant company as collateral security for the loan and that the loan should be repaid out of the proceeds of the sale of them; that the appellant company might call in the loan whenever it saw fit to do so, and that as the consideration for making the loan the appellant company was to be paid five per cent. interest on the money advanced or, at its option, might take the dividends on the shares in lieu of interest, and was when the shares were sold to receive, if there was a gain on the transaction, one-half the difference between the purchase price and the selling price.

I see nothing inconsistent with that having been the real nature of the arrangement, in the circumstance of the telegram of the 27th of May, 1902, from Rowley, the manager of the appellant company, to Wallace:

"You have authority to use your own discretion in purchasing," or in the bought notes being made out by Ames & Co., in the name of the appellant company, or in the fact of the debenture being issued when, as it is said, there was no need for it, because money enough to buy the shares was lying at the credit of the appellant company in the hands of the respondent company; or in the cheque which was issued by the appellant company being for exactly the sum for which the shares had been bought, or in the fact that the debenture was for \$55,000.

On the contrary, every one of these circumstances is, in my opinion, quite consistent with the real transaction having been what, as I have said, I think it was, or if apparently not so, is readily explained.

Why should the shares not have stood in the name of the appellant company? Upon my theory that is just where one would expect them to be, as they were to be the collateral security to the appellants for the loan they were making; a reason, if not the reason, for a debenture being provided for is to be found in the correspondence, which shews that Wallace thought the appellant company would not draw upon its savings bank account for the money to be advanced, and it may have appeared to the parties, as it does to me, difficult to see how

the transaction could have been carried out without the issue of a debenture; if the money had been drawn from the savings bank account, what would there have been to represent the sum which had been at the credit of the lender in the savings bank and was then withdrawn, for that was money owing by the respondent company to the appellant company, and there must necessarily therefore have been given by the borrower some obligation for the repayment of it, and if so, why not the debenture? and why should not the cheque of the appellant company have been drawn for the exact amount the shares cost, when that was the sum they had agreed to advance, and no more? Equally shadowy is, I think, the point taken, based on the debenture being for \$55,000. No doubt only 375 shares were actually purchased, but the agreement shews that it was contemplated that a greater number might be bought; the language of the agreement is "not less than 375 shares" and \$55,000 was the maximum amount of the loan which the parties contemplated being made. Wallace's letter of the 3rd June, 1902, shews that a further purchase of shares was contemplated. The whole three hundred and seventy-five shares had then been bought, and the letter begins, "I have not yet filled order for the other twenty-five shares of coal and will let it stand for the present."

If what Wallace says was his idea of the transaction was what the parties contemplated in entering into it, why was any debenture issued by the respondent company?

To have issued it would have been a deliberate fraud on the respondent company, and why should the inference be drawn that a fraud was devised and carried out? Is it not much more reasonable to think, as I do, that whatever Wallace may now think he then thought, he is mistaken and that the debenture was honestly issued, as it was if the transaction was in fact what I have found it to be.

The almost, if not actually, contemporaneous proposition made by Wallace to the Star Loan Company, as appears by his letter of the 2nd June, 1902, affords, I think, strong reason for believing that Wallace is mistaken, and that the arrangement he made with the appellant company, was similar to that which he proposed to the other company, and which, I think, was plainly a proposition that a loan should be made to

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the respondent company of \$50,000, to enable it to buy the shares for itself on the terms and conditions mentioned in the letter.

There is nothing, I think, that conflicts with my view, in the telegram of the 27th May, 1902, from the appellants' manager to Wallace; fairly read, it means no more than that the board had assented to the proposed arrangement and that Wallace might proceed to buy the shares in accordance with the terms of it.

The learned Master seems from the observations made by him while the evidence was being taken, to have laid great stress upon the circumstance of the respondent company having guaranteed the appellant company against loss in case the shares should be sold for less than their cost.

I find nothing of that kind in the agreement of the 10th June, 1902. The observations referred to are probably based on this sentence in Wallace's letter of the 21st May, 1902, "The Atlas Loan Company will not hesitate to assume all risk in connection with the investment; but what does this amount to more than saying in effect that the Atlas Company would be the buyers of the shares and therefore take the risk of the investment, although the appellant company were to receive one-half of the profits of the venture if there should be any profit made?"

I see no reason for disbelieving the positive testimony of Mr. Baird as to what the transaction really was. That testimony outweighs, I think, the impressions of Wallace who on his own showing was entering into a scheme which involved his committing a gross breach of trust and a deliberate fraud on the company whose president he was, and is sufficient to blow away the clouds of suspicion which if not engendered were developed in the Master's office, and not always, as the appellants with some show of reason complain by methods fitting for the proper conduct of a judicial inquiry.

It may well be that the reason for the issue of the debenture was in some sense the fact that the appellant company had not the power to buy the shares, but only, I think, in the sense that because that was impracticable it was found necessary not that in form but that in substance the transaction

should be a purchase by the respondent company of the shares on its own account, and at its own risk, and a loan to it by the appellant company of the amount required to buy the shares on the security and the terms and conditions mentioned in the agreement.

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I would therefore reverse the decision of the learned Master unless as contended by the respondents the appellants are not entitled to prove, by reason of the invalidity of the debenture as an obligation binding on the respondents.

This point was taken in the Master's office, the ground being that the issue of the debenture was *ultra vires* the respondents because when issued their statutory power to borrow on debentures was exhausted, and because if not exhausted debentures had already been issued to the full amount authorized by the only by-law for the issue of debentures which had been passed by the directors.

It was not necessary for the Master, in the view he took to do so, and he did not deal with this branch of the case, and it was faintly, if at all, argued before me.

It is unnecessary, I think, to consider these objections, for assuming them to be well taken and the debenture void, the appellants would nevertheless in my opinion be entitled to prove for the amount of the loan and the interest upon it.

The appellants had at the credit of their savings bank account, when their cheque of the 11th August, 1902, was drawn, \$81,070.65, and that was reduced by debiting them in the account with the amount of the cheque to \$28,879.40.

If the debenture is void, it is surely not open to the respondents, while repudiating their liability upon it, to claim credit in the savings bank account for the very money which they as the result of the transaction merely transferred from one pocket to the other. I do not think that they can do this, and that the result of their repudiation of liability on the debenture is to render it impossible for them to charge against their indebtedness on the savings bank account the cheque of the 11th August, 1902. It is not as if the money was borrowed to be used to the knowledge of the lender in making an investment which was *ultra vires* the borrower. The investment intended to be made and which was made was *intra vires* the respondent company.

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For these reasons, the finding of the learned Master should be reversed and there should be a reference back with directions to allow the claim of the appellants to the extent of the amount of the loan and interest upon it, and with leave to the appellants, if they so desire, to amend the proof by making an alternative claim in respect of the moneys on deposit with the respondent company, and the appellants must of course value their security and give credit accordingly. The costs of the contestation and of the appeal must be paid by the liquidator of the respondent company.

G. F. H.

[DIVISIONAL COURT.]

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D. C.

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Railways—Accident—Negligence—Crowded Trains—Standing on Platform—Contributory Negligence.

Dec. 20.

The plaintiff when travelling by a train of the defendants was forced by overcrowding to resort to the platform outside one of the cars, and for better protection sat down on the second step, and while so sitting was thrust out by a swerve of the train, which made the people standing on the platform press up against him suddenly. This caused him to lose his balance, and one of his legs protruding, was struck by some fixture on the track, and he sustained injuries:—

Held, that the defendants were liable.

Metropolitan R. W. Co. v. Jackson (1877), 3 App. Cas. 193, specially referred to

THIS was an appeal by the defendants from the judgment of ANGLIN, J., in favour of the plaintiff, upon the findings of a jury, in an action for damages for injuries sustained by the plaintiff owing to the alleged negligence of the defendants under the circumstances stated in the judgments.

The appeal was argued on December 15th, 1904, before BOYD, C., MEREDITH, and MAGEE, JJ.

H. E. Rose, for the defendants, contended that the defendants were not liable, as the only negligence was the plaintiff's own, or at all events there was contributory negligence on his part, citing *Hurd v. Grand Trunk R. W. Co.* (1888), 15 A.R. 58, at p. 72; *Goodwin v. Boston and Maine R.R.* (1892), 84 Me. 203; *Adams v. Lancashire and Yorkshire R.W. Co.* (1869), L.R. 4 C.P. 739; *Worthington v. Central Vermont R.R. Co.* (1891), 64 Verm. 107; *Camden and Atlantic R.R. Co. v. Hoosey* (1882), 99 Penn. 492, at pp. 498-499; *Quinn v. Illinois Central R.R. Co.* (1870), 51 Ill. 495; *Elliott on Railroads*, vol. 4, p. 2055 s. 1630; *Wood on Railroads* (Minor's ed.), vol. 2, p. 1327, s. 308. He also contended that there was no sufficient evidence that the accident happened on one of defendant's trains at all, and that in fact it was a Lake Erie and Detroit River R.W. train; and asked the Court to direct judgment for the defendants: *Jackson v. Grand Trunk R.W. Co.* (1901-2), 2 O.L.R. 689, 32 S.C.R. 245.

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P. H. Bartlett, for the plaintiff, contended to the contrary, and that the evidence clearly shewed that the cars were so crowded, the plaintiff could not have obtained a seat, and that this was entirely a question for the jury: *Metropolitan R. W. Co. v. Jackson* (1877), 3 App. Cas. 193.

December 20. BOYD, C.:—This accident happened on an excursion train engaged by the Irish Benevolent Society to carry a picnic party from London to Port Stanley by the Pere Marquette system in August, 1903. The train was made up to the limit fixed for excursions of 11 passenger coaches, and the evidence appears uncontradicted that these were crowded from London to St. Thomas, and overcrowded from St. Thomas to Port Stanley. The plaintiff's evidence is that he was invited to get on these cars at London and was unable to find a seat and was crowded out to the platform outside. At St. Thomas he was crowded so much that he sat down for better protection on the second step of the outside platform, and while so sitting was thrust out by a swerve of the train which made the people standing on the platform press up against him suddenly. This caused him to lose his balance—one of his legs protruded and was struck by some fixture on the track—probably a fence, and he himself would have fallen off if he had not been grasped by a companion. His companion gives much the same account, and it is corroborated by a third witness, Crawford, as to the dense crowd on the train, and the passengers having to stand on the passages and platforms.

The American cases cited vary somewhat, but I think the result of their holding is that where the passenger goes on the platform and rides there of necessity and not of choice he is not without right of action for injuries sustained from overcrowding, or as the result of overcrowding. In such a conjunction of circumstances, the question of negligence or no negligence is for the jury. The cases are all collected in *Am. & Eng. Encycl.*, 2nd ed., vol. 5, pp. 678-681. I may refer specially to cases like those of *Chicago and Alton R.R. Co. v. Fisher* (1892), 141 Ill. 614; and *Merwin v. Manhattan R.W. Co.* (1889), 113 N.Y. 659.

We need not expect to find cases of this kind in England.

where the method of car construction for railways is different. But the authorities affirm the doctrine here applicable. Thus, in *Metropolitan R.W. Co. v. Jackson*, 3 App. Cas. 193, it is held that overcrowding of passenger carriages may be evidence of negligence, and it is said by Lord O'Hagan, "I am not prepared to say that if the overcrowding had been so connected with the accident as in any way to be its cause the company might not have been liable": pp. 203-4. And Lord Cairns said, "If . . . the overcrowding had any effect on the movements of the complainant, if it had any effect on the particular portion of the carriage where he was sitting, if it made him less the master of his actions when he stood up or when he fell forward, this ought to have been made a matter of evidence": p. 198. See also *Cobb v. Great Western R.W. Co.*, [1893] 1 Q.B. 459, 465. In *Hogan v. South Eastern R.W. Co.* (1873), 28 L.T.N.S. 271, where on the station platform, during an excursion season, an overcrowding was allowed of intending passengers, in consequence of which one was crushed off the platform and hurt, it was held to be actionable negligence on the part of the railway. This is a stronger case where the company had actually taken the person having his ticket on the train for safe carriage.

There is ample evidence to go to the jury—no objection is made to the charge, and the result in the plaintiff's favour ought not to be disturbed.

We disposed during the argument of the objection that the defendants were not the parties liable for the safe conduct of the excursionists. The contract was made with their chief officer, and to all fair intents with them, and in the absence of any contradictory evidence the jury might well find as they did.

MEREDITH, J.:—The plaintiff's story, corroborated by his companion, the witness Harris, was that the defendants permitted their cars to become so overcrowded with passengers that he was forced out of them upon the platform of one of them, and from the platform so far that his foot came in contact with a fence and was injured; and the jury have given credence to that story.

The plaintiff took the train at London; and the defendants admit that afterwards, at St. Thomas, it became much overcrowded; and the accident happened after that.

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The permission of such overcrowding, causing such injury, was clearly actionable negligence, and a breach of the defendants' contract of carriage with due care, and the damages are not excessive.

No question of contributory negligence, in these circumstances, arose. That which, if voluntarily done, would doubtless have been negligent, cannot have that character, so far as the plaintiff is concerned, when involuntarily done through the overcrowding. The jury, therefore, properly negatived contributory negligence.

There was abundant evidence to support the jury's finding that the train was a train of the defendants, and under their management and control; the defendants in whom the knowledge lay did not see fit to give evidence to the contrary as they conclusively could if it were not so. The motion must be dismissed with costs.

MAGEE, J.:—If there were any real doubt as to the defendants having issued the ticket and operated the train, they could have solved it with a single witness. The weakness of the attempt made to cast off responsibility on that score only called attention to the strength which they might have shewn had the facts warranted. No doubt they were entitled to say they would rely on the absence of proof by the plaintiff, but having chosen to withhold information, they could not complain if either the Court or jury were satisfied with a modicum of evidence against them.

The railway on which plaintiff was injured runs from London to Port Stanley, and some years ago was leased by the London and Port Stanley R.W. Co. to the Lake Erie and Detroit River R.W. Co. The evidence shews it to be matter of common repute that it was operated by the defendants. They maintain an office with their sign at London. Through their general agent there they undertook with the Irish Benevolent Society to furnish train service to Port Stanley for the Society's Annual Picnic on August 9th. The negotiations were solely with the defendants. The Society's advertisement referred to the defendants. Their agent's letter to the Society's secretary stated that the defendants could not give August 4th,

as on that date they required all their equipment in Michigan, but he reserved August 9th for the Society. Pursuant to the arrangements instructions were given by the defendant's train master to arrange for the necessary cars. Tickets for the picnic were sold at the defendants' office and were also on sale at the Grand Trunk R.W. Co.'s station from which the trains for Port Stanley depart. The ticket agent there, although he had no official knowledge, understood that the defendants operate the line, and the secretary of the London and Port Stanley R.W. Co. in January, 1904, was furnished with a yearly pass from London to Port Stanley which is headed "Pere Marquette System." The general offices of the defendants and the Lake Erie and Detroit River R.W. Co. are joint, and the unsold tickets printed for this occasion were sent by the agent to Mr. Muller who is General Passenger Agent of "both the Pere Marquette and Lake Erie Railway." The passenger-coaches used are marked some "Pere Marquette" and some, as might be expected, if recently acquired, "Lake Erie and Detroit River R.W. Co." On this train, one car at least was "Pere Marquette." One of the conductors was paid by the defendants, and there seems little doubt the other was also as he was at the time of the trial, though he says he had "L.E. & D.R.R. Co." on his uniform. The plaintiff himself said his ticket read "Pere Marquette," but in that he is evidently wrong.

The defendants point to the tickets, but these only state, "Issued by the Lake Erie and Detroit River Ry.—Irish Benevolent Society Picnic—Good only on August 9th, 1904." No company is mentioned and, for all that appears, this Lake Erie and Detroit River R.W. may be merely a branch or division of the defendants' system. Indeed that seems manifest from the evidence of the conductors. The secretary of the London and Port Stanley R.W. Co. says that their formal consent to the transfer to the defendants of the lease has not been executed though authorized some time ago subject to the solicitor's approval. Such consent may or may not be necessary to the particular arrangements, whatever they may be, under which the road is operated. If it was necessary, the right to withhold it may or may not have been waived. Its absence cannot affect the plaintiff's rights if the defendants have been

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assuming to contract with him or to operate trains. There was here quite sufficient evidence for the jury to find that defendants were doing both.

Neither should the judgment be disturbed on the other branch of the case. The plaintiff got on the train at London and was injured between St. Thomas and Port Stanley. Whatever the number of passengers on leaving London it is not disputed that after leaving St. Thomas many were without seats and the coaches crowded. It is only a question of degree between the witnesses. The plaintiff, a man of 60 years, says he could not get a seat in the car, and was in fact forced to be on the platform, as were others, and to take a seat where he did on the steps, and that even there it was through the crowd suddenly swaying against him that his foot was pushed out so as to be injured by the fence. In this his companion substantially corroborates him. There was contradictory evidence as to the necessity for the plaintiff being on the platform at all; as to how far he was under the influence of liquor; as to his having been told to get on the train and furnished with a seat at London; as to the crowding there; and as to the conductor, when collecting tickets on the platform, telling the plaintiff to get inside the coach. The defendants, it appears, have a rule against allowing more than eleven coaches in a train. The rule is probably a salutary one, but the accommodation at this time does not appear to have been sufficient. The defendants had another train in readiness at London but that does not appear to have been known to the public or to the plaintiff, who says he was told by the train officers to get on this particular train.

The evidence given for the plaintiff sufficiently takes the case out of the ruling of nonsuit in *Metropolitan R. W. Co. v. Jackson*, 3 App. Cas. 193. It did not appear there that the position of the plaintiff's hand on the hinge at the moment of injury from the lawful act of shutting the door from the outside, was caused by the overcrowding. The present case of injury to the plaintiff's foot from a lawful fence outside would have been nearer that had the accident happened, as it is alleged that the plaintiff's companion, Harris, at first said it did, *i.e.*, by the plaintiff voluntarily extending his foot to cross his legs. Equally is

the case removed from that of a man voluntarily leaving his seat to stand upon the platform as put by Burton, J., at p. 72, in *Hurd v. Grand Trunk R.W. Co.*, 15 A.R. 58, and from the American authorities as to voluntarily choosing to stand on the platform merely to avoid inconvenience.

The jury have seen the witnesses, and dealt with the facts, and I do not think there is reason to question their findings, or the propriety of submitting the case to them.

The motion should be dismissed with costs,

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BOUCHER v. THE CAPITAL BREWING COMPANY, LIMITED.

Intoxicating Liquors—Recovery of Payment for Liquor Illegally Sold—Holding License as Trustee—Liquor License Act—R.S.O. 1897, ch. 245, secs. 16, 49 (1), 51, 64 (1), (2), 126—62 Vict. (2) ch. 31, secs. 4, 30.

The defendants, having become possessed of the good-will of a liquor business theretofore carried on by an insolvent, who was indebted to them, and of the chattel property on the premises whereon the business had been carried on, sold them to the plaintiff for \$1,200, it being agreed that the license should be taken out in the name of the defendants' manager, as was in fact done, to be held and controlled by him for the purpose of securing the purchase money. The defendants also obtained a lease of the premises and supplied the plaintiff with liquor to carry on, and which he resold in the course of, his business, they debiting him with the price of the liquor and with the rent:—

Held, that the plaintiff was entitled to recover monies paid by him to the defendants for liquor so supplied, under sec. 126 of the Liquor License Act, R.S.O. 1897, ch. 245, as furnished in contravention of that Act, and especially of sec. 64 (1), prohibiting such sales to unlicensed persons for the purpose of the latter re-selling, and this though the defendants were brewers duly licensed by the Government of Canada for the manufacture of liquor and also held a Provincial brewer's license.

The granting of a license to one who has no interest in the business, and is not an occupant of the premises in which it is carried on, in trust for another who is the true owner of the business, and the occupant of the premises, is not a thing permissible under the Act.

Held, also, that the defendants were not entitled to recover, by way of counterclaim, on notes given by the plaintiff for liquor supplied under the above circumstances, but that there being no scheme of any kind to evade the Act in the arrangement made, the defendants were entitled to recover the rent of the premises and money paid for the plaintiff.

Waugh v. Morris (1875) L.R. 8 Q.B. 202, specially referred to.

Held, further, that the liability invoked by the plaintiff was not a penalty imposed upon the defendants within the meaning of R.S.O. 1897, ch. 108, and could not be relieved against under that Act.

THIS was an appeal by the plaintiff from the judgment pronounced by Teetzel, J., after the trial before him sitting without a jury at Ottawa on May 10th, 1904, dismissing the action with costs, and referring the counterclaim "for trial and adjudication" to the local Master at Ottawa.

The circumstances of the case are stated in the judgment of MEREDITH, C.J.C.P.

The appeal was argued on September 20th, 1904, before MEREDITH, C.J., and IDINGTON and MAGEE, JJ.

W. E. Middleton, for the plaintiff, referred to R.S.O. 1897, ch. 245, secs. 16, 37, 126; *Bowie v. Gilmour* (1895), 24 A.R.

254; *Ritchie v. Smith* (1848), 6 C.B. 462; *Walsh v. Walper* (1901), 3 O.L.R. 158; *Bunk of New South Wales v. Piper*, [1897] A.C. 383.

J. Lorn McDougall, for the defendants, contended that the liquor had not been sold in contravention of the Act, and that the defendants, being holders of a brewer's license, might sell, as they did, in wholesale quantities to others than licensees, and cited R. S. O. 1897, ch. 245, sec. 51; 62 Vict. ch. 31, sec. 4 (O.); *Regina v. Guittard* (1899), 30 O.R. 283; *Smith v. Carey* (1903), 5 O.L.R. 203.

Middleton, in reply, referred to the Ontario Judicature Act, R.S.O. 1897, ch. 51, sec. 57, sub-sec. 3; and *Empire Loan and Savings Co. v. McRae* (1903), 5 O.L.R. 710.

February 11. MEREDITH, C.J.:—The action is brought to recover from the respondents a large sum of money which the appellant paid to them between October 12th, 1901, and February 2nd, 1904, for liquor which he had bought from them and which, as he alleges, was furnished in contravention of the Liquor License Act, R.S.O. ch. 245, or otherwise in violation of law, within the meaning of sec. 126 of that Act, and the action is founded on that section.

The respondents counterclaim for \$2,226.88 in respect of seven promissory notes made by the appellant, of which they are the holders; for \$624.30 for rent of the premises in which the appellant carried on business; for two sums of \$34 and \$42 alleged to have been paid by them for the appellant; and for \$142.35 for interest on all these sums.

In his defence to the counterclaim the appellant sets up that the whole of this indebtedness was incurred in furtherance of an illegal arrangement between him and the respondents, which was entered into for the express purpose, object and intention of enabling the appellant to take and have possession of the premises in which he afterwards carried on business, and to "dispose of, therein and thereon, for his own use and benefit, by retail, divers intoxicating liquors to be drunk and consumed in and upon the said premises without his having been licensed so to do, in violation of the law, and to evade the provisions enacted for the protection of public morals and safety," and the

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appellant alleges that on account of this the respondents are not entitled to recover upon their counterclaim.

At the time the sale of the liquor in question took place, the appellant was carrying on the business of a tavern-keeper in Ottawa, and the respondents were brewers carrying on business at the same place.

The liquor was bought by the appellant for the purpose of reselling it, and some, if not all of it, was resold by him in the course of his business.

The appellant had no license to sell liquor, and unless he was entitled to sell liquor under the license to which I shall afterwards refer, he was a "person not entitled to sell liquor" within the meaning of sec. 64 (1) of the Liquor License Act.

A liquor license for the premises in which the appellant carried on business was issued in each of the years in which the transactions in question occurred, to Henry Kuntz, the manager of the respondents' business.

Kuntz was not the proprietor of the business which the appellant carried on, and the license was obtained by him under the following circumstances:—

A former proprietor of the business (Webb) had failed, and the respondents were creditors of his; the appellant was desirous of acquiring the business, but had not the means to pay for it; the respondents in some way, not explained in the evidence, became possessed of the chattel property which was on the premises, and the goodwill of the business, and these they sold to the appellant for \$1,200, and it was agreed that the license should be taken by and in the name of Kuntz, in order that it might be held and controlled by him for the purpose of securing the respondents for the purchase money, which was also secured by a mortgage on the chattel property upon the premises.

The respondents obtained a lease of the premises on October 21st, 1901. The term of the lease was two years and seven months, to be computed from October 1st, 1901, and the rent \$50 a month, the first payment of which was to be made on the first of the following November.

The appellant was from time to time debited in his account with the respondents with this monthly rent, and it would

appear that he was treated as a sub-tenant of the respondents, holding on the same terms and conditions as those on which they held, or it may be that the respondents were to hold the lease for the benefit of the appellant, but keeping it in their own name as security for the payment of the \$1,200.

Kuntz was not, as I have said, and it was not intended that he should be, the proprietor of the business, and the appellant was not the manager or agent of Kuntz or of the respondents for carrying on the business for them or either of them, but was the proprietor of the business, and the sales of the liquor were, as I have said, made by the respondents to him.

The fees for the license were paid by the appellant, or if paid by the respondents were debited to his account with them, and Kuntz was no doubt, as far as he could be, if at all, a trustee of the license for the appellant, subject to his right to deal with it for the benefit of the respondents in accordance with the agreement which had been entered into.

My brother Teetzel was of opinion that inasmuch as Kuntz held the license as trustee, agent, or representative, of the appellant, and he was selling liquor with the consent and authority of Kuntz, and was himself interested in the license as *cestui que trust*, the liquor sold by the respondents to the appellant had not been furnished in contravention of the provisions of the Liquor License Act, within the meaning of sec. 126, and he therefore held that the action and the defence to the counter-claim failed.

I agree with my brother Teetzel that there was no intention on the part of the respondents or Kuntz in what was done, or agreed to be done, to evade the provisions of the Liquor License Act, and that all the parties to the transaction honestly believed that what was being done was lawful to be done under the authority of the licenses which had been granted to Kuntz, and I, therefore, regret that I am unable to see my way to reach the conclusion to which my learned brother came as to the proper disposition to be made of the action and counter claim.

The right of the appellant to recover depends on the answer which is to be given to the question, was the liquor for which the appellant had paid the respondents furnished in contravention of the Liquor License Act, or otherwise in violation of law,

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within the meaning of sec. 126? for, if it was, no matter how unmeritorious the claim may be, as the section declares, the payment or consideration "shall be held to have been received without any consideration and against justice and good conscience, and the amount or value thereof may be recovered from the receiver by the party who made the same."

Was, then, the liquor sold by the respondents to the appellant and delivered to him between October 12th, 1901, and February 2nd, 1904, furnished in contravention of the Liquor License Act, or otherwise in violation of law?

Sub-section 1 of sec. 49 contains the prohibition against selling without license, and is as follows:—

"49. (1) No person shall sell by wholesale or retail any spirituous, fermented, or other manufactured liquors without first having obtained a license under this Act authorizing him so to do, but this section shall not apply to sales under legal process or for distress, or sales by assignees in insolvency."

This sub-section is subject to certain exceptions in favour of brewers, distillers, and other manufacturers of liquors, to which I shall afterwards refer, and to an exception in favour of chemists and druggists, which for the purpose of the present inquiry it is unnecessary to consider.

Section 64 contains a further prohibition against selling, and it is as follows:—

"64. (1) No person shall by himself or his partner, servant, clerk, agent, or otherwise, sell or deliver intoxicating liquors of any kind to any person not entitled to sell liquor, and who sells such liquor, or who buys for the purpose of reselling, and any violation of the foregoing provision shall be an offence under this Act.

"(2) But no person shall be convicted under this section who establishes to the satisfaction of the police magistrate or other justice or justices before whom the prosecution is heard, that he had reason to believe and did believe that the person to whom the liquor was sold or delivered was duly licensed to sell such liquor, or did not sell liquor unlawfully, or did not buy to resell.

"(3) This section shall apply only to a sale or delivery of liquor in any city, town, or village by a person residing or

carrying on business therein, to a person who sells liquor unlawfully in the same city, town, or village."

The argument for the appellant is that the liquor supplied by the respondents to the appellant was sold and delivered in contravention of this section, because, as it is contended, the appellant was a "person not entitled to sell liquor" within the meaning of the section.

If it be conceded that the appellant was a "person not entitled to sell liquor," this argument is unanswerable. Then, was the appellant a "person not entitled to sell liquor?"

Unless he had first obtained a license under the Act authorizing him to do so, he was not only not entitled to sell liquor, but was expressly prohibited from so doing: sec. 49 (1).

But it was argued for the respondents that, in the circumstances of this case, the appellant should be held to be a person who had obtained and possessed a license under the Act authorizing him to sell spirituous, fermented, and other manufactured liquors by retail within the meaning of sec. 49 (1).

I am unable to agree with this argument.

Section 16 provides that, subject to the provisions of the Act as to removals and transfers of licenses (which have no bearing on the question under consideration) "every license for the sale of liquor shall be held to be a license only to the person therein named and for the premises therein described, and shall be valid only so long as such person continues to be the occupant of the said premises and the true owner of the business there carried on."

It may be that, inasmuch as Kuntz was not the occupant of the premises described in the license issued to him, or the true owner of the business there carried on, the license was never of any validity; but however that may be, it is clear, I think, that the license conferred no right upon the appellant to sell liquor in the course of his own business and on his own account; the license was a personal one to Kuntz, and for a business to be carried on by him in the premises described in the license, of which, in order that the license should be effectual, he must have been and have continued to be the occupant.

I do not mean to say that if Kuntz had been the occupant

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of the premises, and the true owner of the business carried on there, he might not have carried on his business by agents or servants; but, as I have said, the appellant was not even in form either the agent or servant of Kuntz.

The provisions of sec. 16 render it impossible, I think, to hold—assuming the appellant's position to have been that of a *cestui que trust*, and Kuntz to have been a trustee for him—that the license conferred upon the appellant as *cestui que trust*, any right to sell liquor of his own, and for his own benefit, on the premises described in the license.

The language of the section is plain, and the provisions as to obtaining a license emphasize the declaration contained in it.

Of these, the following may be specially referred to: "A license shall not be granted until the inspector has reported in writing to the License Commissioners that the applicant is a fit and proper person to have a license, and that he is known to the inspector to be of good character and reputation:" sec. 11 (1); the inspector "shall not report in favour of any applicant other than the true owner of the business of the tavern or shop proposed to be licensed:" sec. 11 (2); sub-section 8 of sec. 11, which deals with the grounds of objection which may be taken to the granting, and sec. 47 as to constantly and conspicuously exposing the license.

These provisions make it very clear, I think, that the granting of a license to one who has no interest in the business, and is not an occupant of the premises in which it is carried on, in trust for another who is the true owner of the business and the occupant of the premises, is not a thing permissible under the Act; for, if it were, all the elaborate safeguards which the Legislature has provided against the granting of a license to an unfit or improper person might be rendered unavailing, because it would be open for an undesirable person wishing to carry on the business of a tavern-keeper, who could not himself obtain a license, to procure the license to be granted to some unobjectionable person, who would be a trustee for him, and to carry on his own business under the license so obtained.

I come, therefore, to the clear conclusion that the license granted to Kuntz conferred no authority on the appellant to sell liquor on his own account, and in the course of a business

of which he alone was the true owner, and in which Kuntz had no interest whatever.

It was argued, however, that assuming that to be the case, the proviso contained in sub-sec. 2 of sec. 64 is applicable as well to a civil proceeding under sec. 126 as to the offence which sec. 64 creates; in other words, that it is not a furnishing of liquor in contravention of the provisions of the Act within the meaning of sec. 126, if the person furnishing it has reason to believe and does believe that the person to whom it is furnished is duly licensed to sell the liquor, or does not sell liquor unlawfully, or does not buy to resell, although the contrary is the fact.

This contention is not, I think, well founded.

The proviso contained in sub-sec. 2 of sec. 64, is, I think, plainly confined to a proceeding for the recovery of the penalty for the offence created by the section; it is not in form or in substance a qualification of the prohibitory words of sub-sec. 1. That protection is unqualified, "No person shall . . . ;" and sub-sec. 2, as I read it, qualifies only the latter words of sub-sec. 1, "and any violation of the foregoing provision shall be an offence under this Act."

But if the argument of the respondents were well founded, on the facts of this case the respondents must fail in bringing themselves within the proviso, because although they may have honestly believed, as I think they did, that the appellant was duly licensed to sell the liquor which they furnished to him, they had not, in my opinion, reason to so believe.

The respondents contended, lastly, that being as they were, brewers duly licensed by the Government of Canada for the manufacture of liquor, and having, as they had, a brewer's Provincial license, they had the right to sell liquor to others than licensees in wholesale quantities, and therefore to sell to the appellant, even though he were not a person licensed to sell; and for this contention sec. 51 of the Revised Statute, R.S.O. 1897, ch. 245, and sec. 4 of 62 Vict. (2) ch. 31, were relied on.

I am unable to agree with this contention, for in my opinion the authority conferred by the sections relied on does not override the provisions of sec. 64.

There is no good reason why a brewer, any more than any

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one else entitled to sell liquor by wholesale, should be exempt from the prohibition against selling or delivering to a person not entitled to sell liquor, who sells the liquor he buys, or who buys for the purpose of reselling it.

I should be of the same opinion even if the Act of 62 Vict. did not, as it does, provide (sec. 30) that it shall be read with and as part of the Liquor License Act.

I at one time thought that it might be possible to exercise the powers conferred by ch. 108 of the Revised Statutes, and to relieve the respondents from the liability which they have, in my opinion, incurred to the appellant, but I am unable on consideration to see my way to that conclusion; the liability is not, I think, a pecuniary penalty imposed upon the respondents within the meaning of ch. 108.

As I understand it, all that is effected by sec. 126 is to remove the impediment which, at common law, stood in the way of a person seeking to get back what he had given as the consideration on his part of an illegal contract, where the illegal purpose had been carried out.

The result is that, in my opinion, the appellant was entitled to recover the amount which he had paid to the respondents for liquor furnished to him by them between the dates mentioned in the statement of claim, and that as to this branch of the case the appeal should be allowed, and judgment entered for the appellant.

The counterclaim, as far as it is for the price of liquor furnished to the appellant, fails, and should be dismissed, but I see no reason why the respondents may not recover the remainder of their claim, or so much of it as they may be in a position to establish in the Master's office.

The appellant has entirely failed to shew that either the purchase of the goodwill and the personal property, or the renting of the premises, was part of a scheme devised for the purpose of enabling him to sell liquor in contravention of the law, or to enable the respondents to furnish him with liquor which he was to sell illegally. The whole of this part of the transaction was carried out without any violation of the law taking place; there was no obligation upon the appellant to procure the liquor required for his business from the respondents,

or on them to supply it; he was free to procure it wherever he could.

The case comes within the principle of *Waugh v. Morris* (1873), L.R. 8 Q. B. 202, cited in *Pollock on Contracts*, 7th ed., p. 378. It was, as I have said, no part of the contract between the parties that liquor should be sold by the respondents to the appellant for the purpose of his reselling it in violation of the law, and even if that had been their intention in entering into the contract, it is necessary to defeat the respondents' right to recover to shew that there was a wicked intention to break the law; there having been no such wicked intention but an honest belief that what was intended to be done was lawful to be done, the defence to the counterclaim, based upon the alleged illegality of the transaction, failed.

I would, therefore, vary the judgment on the counterclaim by declaring that the respondents are not entitled to recover for the price of any liquor furnished by them to the appellant between October 12th, 1901, and February 2nd, 1904, and making the reference to the local Master at Ottawa to take an account of what is due and owing by the appellant to the respondents in respect of the other claims put forward by them in their counterclaim, and directing that judgment be entered for them against the appellant for what shall be found due, with costs subsequent to the trial.

In taking the accounts the Master will, of course, disallow so much, if any, of the claim of the respondents in respect of the liquor as is included in the promissory notes held by them.

Proceedings on the judgment in favour of the appellant will be stayed until after the report is made, and what is found due to the respondents will be set off against it.

There will be no costs of the action or of the counterclaim up to and including the trial or of the appeal to either party, but the respondents shall have their costs of the reference.

MAGEE, J., concurred.

IDINGTON, J.:—This is an action to recover by virtue of the provisions of sec. 126 of the Liquor License Act, R.S.O. 1897, c. 245, moneys paid by the plaintiff to the defendants, and the

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defendants' counterclaim for moneys due from the plaintiff to the defendants.

The question raised by the plaintiff's claim is whether or not, within the meaning of sec. 126 of the Liquor License Act, there has been made by the plaintiff to the defendant "payment or compensation for liquor furnished in contravention of the Liquor License Act."

It was suggested by counsel for the appellant that there has been a selling or assignment of the business which, *ipso facto*, forfeited the license.

I do not find any such sale or assignment after Kuntz obtained the license.

I infer from the evidence, which is by no means clear, that Kuntz made the arrangement, which is relied upon as the sale to the plaintiff, and then, after that, acquired the license, and at the expiration of that license for part of the license year had a license again issued to himself, and for the succeeding year.

There is nothing in the Act prohibiting this.

Again, it is contended that sec. 64 (1) is as follows: "No person shall by himself or his partner, servant, clerk, agent, or otherwise, sell or deliver intoxicating liquor of any kind to any person not entitled to sell liquor, and who sells such liquor, or who buys for the purpose of reselling, and any violation of the foregoing provision, shall be an offence under this Act."

There must be to constitute a contravention of this: (1) a sale of liquor; (2) to a person not entitled to sell liquors; (3) who resells; or (4) who buys for the purpose of reselling.

No doubt there were sales of liquor by the defendants to the plaintiff, but how much is not very exactly shewn.

Was the plaintiff entitled to sell this liquor?

He cannot claim to have been the agent of the licensee Kuntz, for in no sense was he the seller or owner of the liquor sold by the plaintiff, much less can he be said to have been the servant of the licensee.

The relation of the parties was fixed not only by the actual agreement given in evidence, but by the acts of each and their subsequent dealings, so as to exclude them from taking either of such positions. They intended that the business should be

the business of the plaintiff, and that the business should be held by Kuntz, as agent for the defendants, by way of security to the defendants for the payment of \$1,200.

Can the plaintiff under such circumstances claim that Kuntz was his agent as licensee? I have been unable to find any authority supporting such a position. I have considered the dictum of the late Chief Justice Galt in the case of *Huffman v. Walterhouse et al.* (1890), 19 O.R. 186, at pp. 190-1, where he says: "Under sec. 12 of the Liquor License Act, R.S.O. 1887, ch. 194, the person receiving a tavern license is assumed to have satisfied the commissioners that he or she is the true owner of the business. But notwithstanding the issue of a license to one person, it is competent to shew that the licensee was purely the agent of another, who was the real owner of the business;" and also the cases of *McKay v. Brown* (1859), 5 C.L.J. (O.S.) 91, *Flanagan v. McMahon* (1861), 7 C.L.J. (O.S.) 155, and *Crozier v. Taylor* (1860), 6 C.L.J. (O.S.) 60, in which the forms were all discarded, and the substance got at and results arrived at that may all be expressed by above dictum.

Unfortunately the facts here, and the principles of law to be applied, do not enable me to hold that the issue of the license to Kuntz was a mere form, and that he could in law hold the same as agent for the plaintiff, who, in fact, was owner of the business.

The entire scope of the Liquor License Act is to have a man whose character has been approved of, and after passing tests furnished by sec. 11 and other sections, the actual licensee, the man who is to control the business done under and by virtue of the license, and upon whom is to rest the present obligation to discharge the many duties of such a license. It has been held in *Walsh v. Walper*, 3 O.L.R. 58, that the license is personal to the licensee. And the American cases of *In re Blumenthal* (1889), 125 Penn. 412, and *Commonwealth v. Bryan* (1840), 9 Dana 310, interpreting legislation similar to this Liquor License Act, are directly to the same effect. The cases—upon English legislation of same nature—of *R. v. Jones*, *Ex parte Davies* (1895), 59 J.P. 87, where it was sought to protect a branch manager under a director's license, *Pearson v. Broadbent* (1872), 36 J.P. 485, where all parties, including the justices and

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other parties who issued the license, were under a misapprehension of law through overlooking a repealing Act, *The Queen v. Vine* (1875), L.R. 10 Q.B. 195, where an Act passed to disqualify anyone who had been convicted of felony, was held to render void an existing license and render it unassignable, *Ritchie v. Smith*, 6 C.B. 462, where licensee sublet a room in licensed premises, *Cowles v. Gale* (1871), L.R. 7 Ch. 12, followed in *Tadcaster v. Wilson*, [1897] 1 Ch. 705, each and all point in the same direction.

In *Thompson v. Harvey* (1859), 4 H. & N. 254 whilst holding the license not void by reason of omission in the overseer's certificate to shew that the licensee was real holder and resident, the Judges giving judgment express the opinion that if in fact the licensee was not the real holder and resident, the license would be void. The expression of ownership there corresponds to that of "occupied" used in our Act. It may well be that the parties could have affected their obvious purpose by entering into such an agreement as was considered in *Mayhew v. Suttle* (1854), 4 E. & B. 347, with some additions thereto. Suffice it to say they have not done so, and I see no escape from holding that the plaintiff was within the meaning of the section in question a "person not entitled to sell liquor" when he received from the defendants delivery of that sold to him by them for the purpose of reselling, as I think the evidence proves.

There is no evidence that he did resell. The rather loose presentation of the plaintiff's case in evidence leaves this out, and leaves it to be inferred by what, it is true, must be held irresistible inference from the whole of the evidence.

I think, therefore, the plaintiff is entitled to recover by virtue of this statute from the defendants the amount shewn by the evidence to have been paid for liquor furnished in contravention of the Act. That amount, I think, may be fixed at \$1,900, as the result of considering all of the evidence, and judgment for the plaintiff should be entered for that without costs, subject to being met by set-off arising from counterclaim.

Now, coming to the counterclaim, I think that so much of it as rests upon sales of liquor by the defendants to the plaintiff for purposes of the business in question and payments on account of the licenses, which I treat as void, must fail. When

that is discarded, however, there remains the \$1,200 for which the plaintiff gave his promissory note, and the balance of the rent due for the premises. Can these claims be maintained? Are they free from the taint of the illegality I have been dealing with, or can they be separated from the illegal sales? I think they can be held to be transactions separate and distinct from the illegal sales.

It was not made to appear in the evidence, clear beyond reasonable question or doubt, that the mode of dealing which I have found to be illegal, formed part of the original purchase for which these notes were given. And it would seem as if the parties had rather later—and at all events after the first contract was made, and independently of it—drifted into the illegal methods in regard to the sales of liquor. They might, I think, in some such way as seems not to have been condemned in *Mayhew v. Suttle*, 4 E. & B. 347, have followed up the sale of the business to the plaintiff by an agreement such as appears there, and thus have accomplished the twofold purposes they had in view in a legal manner. I am not to assume or presume that they had intended the illegal methods, when the legal one was open to them. The learned trial Judge has found that they acted “in absolute good faith.”

That could not furnish, in my opinion, any answer to the liability for repayment created by the statute. It may furnish an answer when we come to consider the effect of the illegal dealings, upon the sale of goodwill and leasing contracts, raised by counterclaim.

The law applicable is thus laid down in Smith's Leading Cases, 11th ed. vol. 1, p. 385: “Though a contract to do a thing which cannot be performed without violation of the law is void, whether the parties knew the law or not, yet, in order to avoid a contract *which can be performed legally* on the ground that there was an intention to perform it in an illegal manner, it is necessary to shew that there was a wicked intention to break the law:” *Waugh v. Morris*), L.R. 8 Q.B. 202. See also *Thwaites v. Coultwaite* [1896], 1 Ch. 496.

Another way of looking at the case suggests the application of the well-known rule that if the plaintiff could not make out his case otherwise than through the medium and by the aid of

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the illegal transaction to which he was a party, he must fail: see *Taylor v. Chester* (1869) L.R. 4 Q.B. 309, at p. 314.

Neither does the "wicked intention" on the evidence here taint the bargain, which could have been carried out by legal means, as in *Waugh v. Morris*, nor is it necessary to disclose the illegal transaction in making out the claims for rent and upon the promissory notes. It is set up in the pleadings that these became merged in a chattel mortgage on which, as well as on the original causes of action, defendants rely.

That is a part of the matter referred for trial by the local Master.

Had the evidence bearing upon that point been given, and the story of what was done with the promissory notes, a reference might well, in the view I take, have been dispensed with. It does not seem to be possible, in the incomplete state of the evidence, to go further just now than to say for the reasons I give above, that the judgment as to the counterclaim must stand, though that dismissing the plaintiff's claim be reversed.

Proceedings should be stayed on the plaintiff's claim to abide the result of the reference, which is suggested by the judgment of the Chief Justice, which I have seen since writing the foregoing, and in which I concur both as to the terms of reference and the disposition of the costs.

A. H. F. L.

[DIVISIONAL COURT.]

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Jan. 12.

Discovery—Examination of Person for whose Immediate Benefit Action Defended—Action against Assignee for Creditors—Examination of Assignor—Reference for Trial—Power of Referee to Order Examination—Con. Rules 440, 466.

This action being at issue all matters were referred to be tried before a referee pursuant to sec. 29 of the Arbitration Act, R.S.O. 1897, ch. 62:—

Held, MEREDITH, J., dissenting, that the reference being before trial and the cause being referred for the purpose of trial, the referee had power to direct one who was a party, or one for whose immediate benefit the action was prosecuted or defended, to be examined for discovery.

The action was brought against an assignee for the benefit of creditors to establish the right of the plaintiff to rank upon the estate, which was in fact insolvent:—

Held, MEREDITH J., dissenting, that the assignor was a person for whose immediate benefit the action was defended within the meaning of Rules 440 and 466, and was to be regarded as a party for the purpose of examination and discovery.

THIS was an appeal by the defendant from the order of Teetzel, J., in Chambers, of December 9th, 1904, dismissing an appeal from the certificate of Neil McLean, official referee, of his ruling, in the course of a reference, that the plaintiff was entitled to examine for discovery one David E. Starr, against whose assignee for the benefit of creditors this action was brought, to establish the right of the plaintiff to rank upon the insolvent estate.

The appeal was argued on December 14th, 1904, before BOYD, C., and MEREDITH, and MAGEE, JJ.

C. A. Masten, for the defendant, contended that Starr was not a party for whose immediate benefit the action was brought, within the meaning of Con. Rule 440; and that there was no authority under the rules for the Master to make the order.

W. M. Douglas, K.C., contended to the contrary, and cited *Macdonald v. Norwich Union Ins. Co.* (1884), 10 P.R. 462; *Minkler v. McMillan* (1884), *ib.* 506; *Hilderbroom v. McDonald* (1882), 8 P.R. 389; *Frothingham v. Isbister* (1891), 14 P.R. 112; *Brooks v. Georgian Bay Saw-log Salvage Co.* (1895), 16 P.R. 511.

Masten, in reply, cited *Moffat v. Leonard* (1904), 4 O.W.R. 201.

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January 12. BOYD, C.:—Rule 440* and Rule 466† are *in pari materid*, and provide that a person for whose immediate benefit an action is prosecuted or defended is to be regarded as a party for the purpose of examination and for the purpose of discovery. The original of these rules is the former Chancery Con. Orders 138-140. By this old practice, production might be had at any time after answer or the time for answering had expired, and examination might be had “at any time after the answer and at the hearing of the cause.” Under the present rules, examination for discovery may be “before the trial:” Rule 439‡; and production may be ordered “at any time pending the action or proceeding:” Rule 463.§ Rule 440 has been construed to apply to a debtor who has assigned his estate for the benefit of creditors, even though the estate may be insolvent. In *Macdonald v. Norwich Union Ins. Co.*, 10 P.R. 462, Rose, J., held, after conference with his colleagues, that such assignor might be treated as one to be immediately benefited by the litigation. This decision was followed in 1897 by McColl, J. (afterwards Chief Justice of British Columbia) in *Tollemache v. Hobson* (1897), 5 B.C. 214, and I think that, as a correct decision in a matter of practice, it should not now be disturbed after the lapse of so many years: *Johnston v. Ryckman* (1904), 7 O.L.R. 521, at p. 523.

There would be no difficulty, then, in supporting this order to examine the debtor Starr for discovery and have him make production of papers, if the action had not been referred. This cause being at issue, all the matters were referred by order of April 6th, 1904, to be tried before a referee, pursuant to sec.

* Rule 440. A person for whose immediate benefit an action is prosecuted or defended shall be regarded as a party for the purpose of examination.

† Rule 466. A person for whose immediate benefit an action is prosecuted or defended is to be regarded as a party for the purpose of production of documents.

‡ Rule 439. A party to an action or issue, whether plaintiff or defendant . . . may, without any special order . . . by order of the Court or a Judge, be orally examined before the trial touching the matter in question by any party adverse in interest . . .

§ Rule 463. The Court or a Judge at any time pending any action or proceeding, may order the production by any party thereto, upon oath, of such of the documents in his possession or power relating to any matter in question in such action or proceeding as the Court or a Judge thinks right; and the Court may deal with such documents, when produced, in such manner as appears just.

29, R.S.O. 1897, ch. 62. The whole cause and all its issues were thus before a referee to be tried, and having regard to the original scope of the orders in question, I think it competent for an order to issue for the purpose of examining the assignor with a view to the proper trial of the cause. He has plenary powers to deal with the cause under the statute, and, in addition, under Con. Rules 648, 665, 666, 667 and 669. The English rule as to this aspect of references for trial—Order 36, Rule 50 (474)—provides that the referee shall have the same power as a Judge with respect to discovery and production of documents, and this provision is by reasonable implication to be treated as embodied in his power to examine the parties and investigate the matters in difference referred to him.

This reference being before trial, and for the purpose of trial referred, I hold that the referee can properly direct one to be examined for discovery who is a party, or who is to be treated as a party to the litigation.

The costs of appeal should be in the cause to the plaintiff.

MEREDITH, J.:—The first ground of appeal is that the referee "had no jurisdiction," and no matter what view the parties may at any time have taken of the question, it is our first duty to consider whether the referee exceeded his power in making the order in question, which is not a mere direction but a formal order issued in a formal manner.

No attempt has been made to support any such power except under Con. Rules 439 and 440, but it plainly appears on the face of those rules and of Con. Rule 443, that no such power is thereby conferred. These two things are expressly and very clearly provided: (1) that the examination shall be "before the trial," and (2) that no order is to issue, but the examination is to be had, and attendance compelled, by appointment and subpoena. The plaintiff was either entitled to the examination without an order, or else not entitled to it at all. There is no pretext upon which the issuing of an order can be upheld, and so no power to make it.

A reference is generally a proceeding in the action subsequent to the trial; at the trial the rights of the parties are considered or determined generally, and the reference is to take

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the necessary accounts or otherwise work out the details affecting such rights, and even the most that can be said is that it is a continuation of the trial. It is to be observed, too, that though the rule formerly provided that the examination might be had "before and at the hearing" in some instances, it is now expressly limited to "before the trial." A reference does not transfer the whole action to the office of the Master or referee; it is for a specific purpose. In this case, under a judgment of the Court on motion for judgment, the action and all questions of fact and of accounts were referred to a special referee for trial, not for preliminary skirmishes.

And, apart from these considerations plainly written in the rules themselves, it seems to me that no power was ever intended to be, or has been, conferred upon a Master or referee by these rules or otherwise, to compel before trial discovery by means of an examination of parties or witnesses. The purpose of the rules in question was discovery before trial, for the purposes of trial—using the word trial in its ordinary sense, not including a reference—so that there might be a full and fair trial, without unfair advantage or disadvantage to either party, and without unnecessary delay or avoidable expense, sometimes occasioned by surprise. A trial ordinarily must take place in a short space of time; it cannot go on from day to day; it cannot be needlessly postponed even from hour to hour, as the convenience or negligence of the parties or their witnesses might demand; so ample provision is thus made, and he who is unprepared or surprised must, generally speaking, have failed to duly avail himself of his opportunities.

But it is entirely different in the Master's or referee's office, for there the proceedings go on from day to day, or in a still more leisurely fashion. If one suffers from surprises there, abundant time to recover is given. The course of proceeding is such that no sort of a satisfactory reason can be given for incurring the expense and delay of before-trial discovery there, when before trial it was not deemed of sufficient importance to take it.

The powers conferred upon Masters and referees are contained in a set of rules made for the especial purpose of governing proceedings in their offices, rules which leave no room for fault-finding as to their sufficiency for all practical purposes,

and which cover the subject of discovery upon references, but do not include the rules in question, which come under a different heading in the practice relating to interlocutory proceedings. If the powers conferred by these rules may be exercised by Masters and referees, it is difficult to perceive why they may not exercise the powers conferred by all other rules relating to other interlocutory proceedings before trial or judgment; why they have not all the powers of the Master, and of a Judge, in Chambers, which of course cannot be.

There has been much judicial fault-finding with the abuse of the right to examine for discovery before trial, and by no means the least of it in this court, and several amendments to the rules have been made to prevent it: are we, notwithstanding, to give a double opportunity for such abuses—an opportunity after trial, and so the less under the eyes of the Judges, as well as an opportunity before trial, without any sort of substantial reason for it; for surely the one opportunity which every litigant has ought to be enough?

The entire want of any good reason for it is made manifest in this case. The plaintiff desires no discovery to enable him to prove his case, it is only in respect of the defence to it that he is over anxious; but that he will hear in good time, and, after hearing it, have every reasonable opportunity for meeting it. Upon cross-examination of the witness he can obtain the fullest discovery, and can have production of every document, more fully and more satisfactorily than upon a before-trial examination for that purpose. No good object can be gained by the double examination, and an inexcusable addition to the costs and inconvenience to the witness can flow from it.

The cases in England are apt to mislead if looked at no closer than through a digest or no deeper than the headnotes. In England there is a rule expressly giving a referee the same power as a Judge of the High Court "with respect to discovery and production of documents." Where can a like rule be found in our practice? Unless the power is conferred by rule or enactment, it cannot exist. It is not necessary here, because our rules make more detailed, and, as I think, better provision respecting the whole reference: see Con. Rules 648, 654, and 499; also *Rowcliffe v. Leigh* (1876), 4 Ch. D. 661; *Dauvillier v.*

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Myers (1881), 17 Ch. D. 346; *MacAlpine & Co. v. Calder & Co.*, [1893] 1 Q.B. 545; *Hilderbroom v. McDonald*, 8 P.R. 389, and *Brooks v. Georgian Bay Saw-log Salvage Co.*, 16 P.R. 511. I decline to create it by adjudication.

It is not as if we were dealing with an isolated case; we are laying down a rule which will be applicable to all references, and opening, I fear, a wide avenue by which the burdens of litigants may be increased without any gain. It is the first attempt of the kind in my experience, and I have yet to learn of a single other instance in which any such examination has been ordered or had in the more than half a century during which the rule relied upon has been in force in one form or another. See, too, *Richardson v. McCreery* (1877), 1 Abb. N.C. 355.

Then, is the assignor for the benefit of creditors a person for whose *immediate benefit* this action is defended? He is certainly a person who may be very much interested in and very much benefited by the defence. In theory—if I may use that expression—he is the only person very greatly interested, and the only person to be eventually benefited, for it is he who must eventually pay all the creditors, he who must eventually suffer the loss caused by allowing anyone, not entitled, to be paid out of the estate, any but just creditors to rank upon it; but, substantially, he may have no real interest, as, for instance, if he be so hopelessly insolvent that there is no possibility of ever being able to pay anything. But the rule does not provide that the person, in whose interest or for whose benefit merely the action is brought or defended, shall be examinable; it is limited to the person for whose *immediate* benefit it is brought or defended, which is quite a different thing. It is difficult to understand how it can be said accurately that this action is defended for the immediate benefit of the assignor. If he is to be benefited, it is only ultimately; it is not immediate as to intervention of time, nor as to intervention of cause or event. Speaking generally, the order of benefit in both respects would be (1) the trust estate and the assignee; (2) the creditors in respect of their dividends; and (3) the assignor; so that his would not be even a case of mediate, but would be one of last, benefit. We cannot ignore the word “immediate,” and so

make the assignee, all the creditors—numerable or innumerable, —and the assignor, all examinable; we must give to it some meaning, and to do so must, upon the proper construction of the rule, exclude the assignor in this case.

But it is said that the established practice prevents that, if it be a true construction of the rule. I do not think so. Neither of the cases which Rose, J., considered—with some doubt and hesitation—came within the rule, was the same as this case; the judgment in neither of them can be considered an authority in such a case as this. The logical deductions from the *Clarkson* case might bring this case within the rule, but there is very high authority for saying that a case is authority for that which it decides only, and not for that which may seem logically to follow from it: *Queen v. Leatham*, [1901] A.C. 495, at p. 506.

The cases which came before Rose, J., were cases of an assignee suing. This is a case of an assignee being sued. It is hardly necessary to point out that there may be a great difference between such cases, whether the assignment is for the benefit of others or for the assignee's own benefit only, and whether of an estate, a chose in action, a lease, or any other property or right.

No case has been cited, and I am not aware of any in which it has ever been held, that in a case such as this the assignor comes within the rule. Excluding such assignors, the rule would yet have a pretty wide effect, covering nominal plaintiffs, bare trustees, and many others.

We cannot, therefore, I think, uphold the plaintiff's contention on the ground of long-established practice; and, if we otherwise could, the amendment to the rules making the assignee of a chose in action examinable in an action brought by the assignee, but not in an action brought against the assignee, Rule 441, might possibly prevent it. It would be open to contention that the framers of the rules, and the Legislature in confirming them, had affirmed or ratified this ruling of Rose, J., but had in effect added that it was not to be extended to the case of an assignee sued. Otherwise, the adding of the new rule might be superfluous in view of the judgment in the *MacDonald* case.

On this ground, also, I would allow the appeal.

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MAGEE, J.:— Rule 669, empowering the Master to cause parties to be examined and to produce papers, dates back to 1853, and is the same as Chancery Order 222 of 1868, which was recognized and acted on by the Court of Appeal as authorizing the Master to direct discovery of documents: *Re Ross* (1880), 5 A.R. 82.

It is conceded that the referee in this case has the same power as the Master; as to which, see Rules 648, 650, and 654.

In England a referee for trial is expressly given the same power as to discovery and production of documents as a Judge: Order 36, R. 50. See *McAlpine & Co. v. Calder & Co.*, [1893] 1 Q.B. 545, at p. 550, as to power of Judge.

By Rules 440 and 466 a person, for whose immediate benefit an action is prosecuted or defended shall be regarded as a party for the purposes of examination and production.

There is no similar rule in England, but the Court has exercised its inherent jurisdiction and ordered discovery by the foreign principal in an action brought in his agent's name for an insurance effected by the agent: *Willis v. Baddeley*, [1892] 2 Q.B. 324.

These rules, 440 and 466, are found in ch. 7 of the Consolidated Rules, under the head of "Discovery," while Rule 669 is in ch. 11, under the head of "Accounts and References" and the sub-heading of "Proceedings in references to Masters and referees"; but by Rule 7 the division of the Consolidated Rules into chapters, titles, and headings, is declared to be for convenience only, and shall not affect the construction.

If discovery is to be made at all before the Master or referee, there does not seem to be any reason why the word "party" should be more limited than at a previous stage, nor why Rules 440 and 466 should not apply to Rule 669 in view of Rule 7.

Then, is the defendant's assignor, Starr, a person for whose immediate benefit this action is defended?

In *Clarkson v. Fire Insurance Association (Macdonald v. Norwich Union)*, 10 P.R. 462, Mr. Justice Rose in 1882, with some hesitation, held that discovery could be obtained from the assignor in an action by his assignee for the benefit of creditors on a fire insurance policy. He considered that the assignee

might be looked upon as an agent appointed by the assignor to collect the debt, and that the latter had an immediate and direct interest in the result of the suit, and that the assignee was prosecuting it for his immediate benefit. Rule 441 now expressly provides for examination of an assignor of a chose in action.

There is, doubtless, a distinction between the case of the assignee suing for an alleged asset received from the assignor in trust for collection, and the present one where the assignee, in pursuance of his duty presumably to the other creditors, is protecting from attack the trust fund committed to him, but the distinction does not seem to me sufficient to lead one from the main principle of that decision, that the assignor has an immediate interest in an action affecting the trust fund he created.

But for that case I would find considerable difficulty in coming to the conclusion that the present one comes within the rules referred to, in the absence of evidence of active participation by Mr. Starr in the conduct of the defence. If the plaintiff's claim is unjust, Mr. Starr has theoretically, if not practically, a clear interest in having the suit defended. If the claim is valid, he would have no interest, for no matter what the result, his total personal liabilities would not be affected, except possibly by the amount of costs. In truth, each of his creditors is more immediately interested in the defence than he—if we assume the estate to be insolvent—and the question arises, if mere interest were sufficient apart from the act of creation of the trust, whether each creditor could be asked to make discovery, and to what extent would the rule have to be applied in actions against executors or other trustees. A side question is the expense to which a stranger to the action may be put.

In the present case the plaintiff's application seems reasonable. Mr. Starr is really more likely to possess documents and information than the defendant. The question discussed by counsel whether or not, or to what extent, the examination could be used as evidence, need not be considered. It is a legitimate purpose of discovery to obtain information which may lead to obtaining evidence: *Attorney-General v. Gaskill*

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(1882), 20 Ch. D. 519, 528; and not merely evidence to support the plaintiff's own case, but to answer the defence to be set up, as to which here the plaintiff claims to be in the dark: Proudfoot, V.-C., in *Western of Canada Oil Co. v. Walker* (1874), 6 P. R. 191. The referee seems to have exercised a proper discretion in making the direction, if that was required of him.

In view of the decision in *Clarkson v. Fire Insurance Associations* (*Macdonald v. Norwich Union Ins. Co.*), 10 P.R. 462, so long undisturbed, I think the order appealed from should stand, with costs in the cause to the plaintiff.

A. H. F. L.

[DIVISIONAL COURT.]

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March 2.

Costs—Taxation—Objections—Appeal from Local Taxing Officer—Reference to Taxing Officer at Toronto.

As a foundation for an appeal from a taxation of costs between party and party objections must be filed with the officer taxing and these objections must be directed to specific items; or, *semble*, at the least if a general objection is relied on it must be expressly stated to be directed to each and every item in the bill. A general objection that the bill is exorbitant is not sufficient.

Upon a mere general objection of this kind or even upon specific objections to specific items the Judge before whom an appeal from the taxation of a bill by a local taxing officer comes for hearing, has no right to refer the bill to one of the taxing officers at Toronto for revision or retaxation. He may ask the opinion of one or both of these officers as to any question arising but he must himself decide the points involved.

Quay v. Quay (1886), 11 P.R. 258, explained.

Judgment of FALCONBRIDGE, C.J.K.B., reversed.

APPEAL by the plaintiff from an order of Falconbridge, C.J.K.B., made on the 10th of February, 1905, referring the plaintiff's bill of costs to the senior taxing officer at Toronto, to be taxed as upon a revision of taxation and to report.

The order appealed from was made on the application of the defendant pursuant to Con. Rule 774, to review the taxation of the plaintiff's costs by the local taxing officer at Cornwall.

The defendant, being dissatisfied with the taxation, delivered, pursuant to Con. Rule 1182, to the plaintiff and to the taxing officer, objections in writing to the taxation.

These objections, besides specifying as objected to a large number of the items of the bill, and giving in each case the reasons for the objection, concluded with the following general complaint: "The defendant also complains that the bill generally is exorbitant, that the allowances as a rule are too large, and that altogether too much has been taxed for folios, attendances, etc., etc."

The taxing officer, according to his certificate of the 28th of January, 1905, considered the objections, and confirmed his taxation, but he did not state "the grounds and reasons of his decision" on them, doubtless because he was not required to do so by either party.

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The appeal was argued before a Divisional Court [MEREDITH, C.J.C.P., TEETZEL and ANGLIN, J.J.] on the 20th of February, 1905.

W. E. Middleton, for the appellant. There was no jurisdiction to make this order of reference. The procedure on an appeal from taxation is clearly defined in the Rules, and that procedure has not been followed. A general charge of exorbitancy is not sufficient. Objections to specific items must be made, and only the items objected to may be dealt with by the Judge who hears the appeal. The Judge has no jurisdiction to refer the bill to one of the Toronto taxing officers for retaxation, but must himself decide whether the local taxing officer has come to a right conclusion. It is true that in *Quay v. Quay* (1886), 11 P.R. 258, a somewhat similar order was made, but in that case there were special circumstances and the learned Chancellor did not intend to lay down a general rule, as may be seen by comparing his decision in *Platt v. Grand Trunk R.W. Co.* (1887), 12 P.R. 273. See also *In re Chisholm and Logie* (1894), 16 P.R. 162, and *In re LeBrasseur and Oakley*, [1896] 2 Ch. 487.

J. Grayson Smith, for the respondent. The general objection to the bill is sufficient to give jurisdiction to consider the items, and the Judge who hears an appeal from taxation is entitled to take the opinion of a taxing officer to aid him in coming to a decision. *Quay v. Quay* is an express authority upon the point. The practice there laid down is a most convenient one, and even if the decision goes further than a strict reading of the Rules would allow, it should not be overruled. See also *Loomis v. Pearsall* (1891), 12 C.L.T. Occ. N. 19; *Snider v. Snider* (1885), 11 P.R. 140.

Middleton, in reply.

March 2. The judgment of the Court was delivered by MEREDITH, C.J. (after stating the facts as above set out):— It was contended before us by the appellant, as it was stated by his counsel it had been contended before the learned Chief Justice, (1) that what I have spoken of as the general complaint was not a sufficient objection within the meaning of Rule 1182, and that therefore as to all the items

not otherwise specified in the objections the certificate of the taxing officer was final and conclusive (Rule 774), and (2) that upon an application to review the taxation as to any items objected to, it was not proper to refer the items for taxation as upon a revision, and much less to refer the whole bill of costs for taxation in that way.

The learned Chief Justice appears to have followed the course adopted by the Chancellor in *Quay v. Quay*, 11 P.R. 258, which is thus stated by him at page 260: "I have thought it a convenient practice, when any case is made on appeal as to several items or on the ground of general exorbitancy, to refer the whole bill to one of the taxing officers at Toronto as upon a revision: *Snider v. Snider*, 11 P.R. 140."

I am, with great respect, of opinion that the course which the Chancellor is reported to have adopted is not warranted by the Rules or sanctioned by the course of judicial decisions on the provisions of the corresponding English Rules.

The Consolidated Rules, having been confirmed by legislation, have the same effect as an Act passed by the Provincial Legislature itself.

By Rule 85 the local taxing officer is, subject to certain other Rules and to an exception, none of which is relevant to the present enquiry, in an action begun or pending in his office, entitled to tax all bills of costs including counsel fees, subject only to appeal to a Judge of the High Court.

Rule 774 provides for the appeal, and is as follows:—"In cases to which Rule 773 does not apply, a party dissatisfied with the certificate of a taxing officer may apply to a Judge in Chambers to review the taxation as to any item or part of an item, which has been objected to as provided by Rules 1182 and 1183; but the certificate of the taxing officer shall be final and conclusive as to all matters which have not been objected to in manner aforesaid."

Rules 1182 and 1183 provide as follows:—"1182 (1) A party dissatisfied with the allowance or disallowance by the taxing officer of the whole or any part of any item may, at any time before the certificate is signed, deliver to the other party interested therein and to the taxing officer objections in writing to such allowance or disallowance, specifying concisely the items

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objected to, and may thereupon apply to the taxing officer to review the taxation in respect to the same.

(2) The taxing officer shall hold the taxation open for a reasonable time in order to allow such objections to be delivered.

1183. Upon the application the taxing officer shall reconsider and review his taxation upon such objections, and he may receive further evidence in respect thereof, and, if required, he shall state, either in his certificate of taxation or by reference to such objections, the grounds and reasons of his decision thereon, and any special facts and circumstances relating thereto."

It would seem to be reasonably clear from these provisions that the local taxing officer had in respect to the bill in question no less powers than the taxing officers at Toronto possess for the taxation of costs; that the only remedy for an improper taxation by the local taxing officer is an application to a Judge in Chambers to review the taxation; that only the items objected to in the manner provided by Rule 1182 are open to review, and that as to all items not so objected to the certificate of the local taxing officer is final and conclusive.

If this be the correct view, it follows that any practice of sending the whole bill to a taxing officer in Toronto for taxation, as upon a revision, is not warranted by the Rules.

A revision of the bill of costs by the taxing officer at Toronto is a retaxation of the bill: *Keim v. Yeagley* (1873), 6 P.R. 60; *Re Robertson* (1877), 24 Gr. 555, at p. 560. A review of a taxation upon an appeal from the certificate of the taxing officer is a very different thing. On an appeal, the discretion of the taxing officer in matters as to which a discretion is vested in him will not be interfered with unless it is manifest that he has failed to exercise it in a reasonable manner: *Holmsted and Langton*, pp. 957-8, and cases there cited; *Snow's Annual Practice*, 1905, p. 1014, and cases there cited; and though the Court may it will slowly and reluctantly enter into questions of mere quantum: *Smith v. Buller* (1875), L.R. 19 Eq. 473, at p. 478. On a revision of a taxation the officer retaxes the bill, and it is his discretion that governs as to matters which are left to the discretion of the taxing officer, and that discretion is substituted for the discretion of the taxing officer whose taxation is being revised.

The English Rules, corresponding to our Rules 774, 1182 and 1183, are Order 65, rule 27, sub-rules 39, 40, 41 and 42; they contain some provisions which are not in our Rules. Among these are provisions that besides specifying in the objections by a list in a short and concise form the items or parts of them objected to, the objection is also to specify the grounds and reasons for the objections; that the Judge may on the application for the order to review the taxation make such order as he may think just, that the application is to be heard and determined upon the evidence brought in before the taxing officer, and that no further evidence shall be received unless the Judge shall otherwise direct.

There are to be found in the books numerous cases in which the effect of these Rules has been considered. The cases show that the Court has invariably refused on an application to review the taxation, to consider objections which have not been carried in before the taxing officer: *Re Nation* (1887), 57 L.T. 648; *Hester v. Hester* (1887), 34 Ch. D. 607, at p. 617; *Strousberg v. Sanders* (1889), 38 W.R. 117; *Shrapnel v. Laing* (1888), 20 Q.B.D. 334, *per* Lord Esher, at p. 337; *Craske v. Wade* (1899), 80 L.T. 380; and that it is very difficult where, owing to a mistake of the solicitor, objections have not been carried in to obtain any relief: *In re Furber* (1898), 33 L.J. (Notes of Cases) 303, 343; *Geake v. Greenways* (1903), 38 L.J. (Notes of Cases) 132.

In *Stevens v. Griffin*, [1897] 2 Q.B. 368, an order made by Bruce, J., referring to one of the masters the items in the bill mentioned in the objections for retaxation was affirmed by the Court of Appeal. In that case the bill had been taxed in the district registry under Order 35, Rule 4, which provides that where final judgment is entered in the district registry costs shall be taxed in such registry *unless the Court or a Judge shall otherwise order*, and it was because of the words I have italicized and the provision in Order 65, Rule 27, sub-rule 41, which I have mentioned, that upon the application for an order to review a taxation "the Judge may thereupon make such order as the Judge may think fit," that it was determined that there was jurisdiction to make the order which was appealed from.

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That case is therefore not an authority for making a similar order under our Rules, and it will have been observed that even under the wide jurisdiction which it was held was vested in a Judge in Chambers under the English Rules the retaxation was confined to the items of the bill as to which objections had been carried in before the taxing officer.

The learned Chancellor in *Quay v. Quay* (page 260) quoted as "not inapposite to the state of affairs in this Province" what was said by Chitty, J., in *In re Wilson* (1884), 27 Ch. D. 242, at p. 245, as to the undesirability of district registrars acting as taxing masters, but, fortunately or unfortunately, the Legislature has decentralized taxations and has not vested in a Judge in Chambers the power which by Order 35, Rule 4, is conferred upon an English Judge, and which enabled Mr. Justice Chitty to give practical effect to the view expressed by him.

Even if the course of decision in this Province had been uniformly in accordance with the practice adopted by the learned Chancellor in *Quay v. Quay*, I should have gravely doubted whether when it came to be challenged for the first time in a Divisional Court it would have been proper to have sanctioned it, if it be, as I think it is, directly opposed to the express provisions of the statute law of the Province; but we are not called upon to deal with such a state of things, for the learned Chancellor himself, in *Platt v. Grand Trunk R.W. Co.*, 12 P.R. 273, said: "I do not think I should admit any question as to an item not included in the objections put in to the original taxation," and Ferguson, J., in *Cameron v. Cameron* (1889), 9 C.L.T. Occ. N. 196, appears to have treated it as clear that objections must be put in, and held that he had no power to open up the taxation in order to enable objections to be put in, quoting the then Rule 851, "the certificate of the taxing master shall be final and conclusive as to all matters which shall not have been objected to in the manner aforesaid." See also *Snowden v. Huntington* (1887), 12 P.R. 248, where an appeal from a taxation by the local registrar at Cornwall was held to be irregular and was dismissed because no written objections had been delivered or carried in before him.

I am inclined to think that the report of *Quay v. Quay* is in some respects inaccurate or misleading, for on reference to

the papers in the case, I find that the items questioned on the appeal were objected to as provided by the Rule then in force, and that there was no objection to the bill generally on account of its exorbitancy or "general exorbitancy." In the objections the items objected to were numbered and pointed out by reference to the pages of the bill and the numbers of the items on the pages, and the notice of appeal was in terms confined to the "disallowing to the plaintiff the items in her bill of costs, to which objection was taken by the defendant to the taxation thereof before the local registrar, and which said objections were put in in writing before the said local registrar on such taxation, and a copy whereof was served upon the solicitors for the plaintiff on the 13th day of February, 1886, and a copy whereof is hereto attached, and for an order disallowing the different items referred to in the said schedule hereto attached, upon the ground," etc.

I come, therefore, to the clear conclusion that the learned Chief Justice had no jurisdiction to refer any of the items objected to for taxation as upon a revision, or to review either himself or with the assistance of the taxing officer at Toronto any item or part of an item of the bill as to which an objection had not been brought in to the local taxing officer, pursuant to Rule 1182.

There remains to be considered the question whether what I have spoken of as the general complaint is a sufficient objection to the items not specifically mentioned, within the meaning of Rule 1182, and I am of opinion that it is not. It may be that the Rule is complied with if the party complaining states in his objection that he objects to each and every item of the bill, but that has not been done in this case. The complaint is not directed in terms to all the items not specifically referred to, and it is impossible to say to which of them objection is intended to be taken. Such an objection does not, as the Rule requires that it shall, specify "concisely the items objected to," and it was not therefore open to the defendant to question any of the items sought to be covered by this general complaint.

Upon the whole, I am of opinion that the appeal should be allowed, and the order appealed from should be varied by making the reference to review the taxation as to the items objected

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to as upon an appeal from the taxation by the local taxing officer.

Under all the circumstances there should, I think, be no costs of the appeal to either party.

I would not have been disposed to make the order in the form I have proposed that it should take if Mr. Middleton had not consented to that being done.

A Judge in Chambers upon an application to him under Rule 774, to review a taxation, has, in my opinion, no jurisdiction to delegate the duty which the Rule imposes upon him to a taxing officer at Toronto or to anyone else. That he may take the opinion of that officer as to any and all matters arising upon the application I do not question, but that opinion must be obtained only for the information of the Judge, whose own opinion the parties are entitled to have, and it, and it alone, is that which the Rule permits to prevail in determining the questions raised by the appeal.

R. S. C.

[IN THE COURT OF APPEAL.]

MONRO V. THE TORONTO RAILWAY COMPANY ET AL.

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Jan. 4.
Nov. 14.*Lease—Infant—Repudiation by—Settled Estates Act—Tenants in Common—
Ouster—Waste—Partition Deed—Validity of—Reformation of—Damages.*

The plaintiff, while an infant, joined with his father, the life tenant of certain property, and with his adult brother and sister (who with himself took the reversionary estate) in a lease thereof to the defendants, a railway company, under the Short Forms Act, for ten years, in which the lessors were not to be liable in case of repudiation by the plaintiff on his attaining his majority. The lease did not provide, as required by the Settled Estates Act, that it was made without impeachment of waste, nor that any timber or trees would not be cut down, except in the ordinary course of husbandry, while it permitted trees to be cut down for the use of the property as a pleasure ground, but which were, unless absolutely necessary for certain construction purposes, not to exceed five inches in diameter. It also contained the ordinary covenant to repair. The company pulled down some buildings on the property, made roads and paths through it, erected pavilions and ran their railway into it, whereby large crowds were brought there. On the father's death, the plaintiff, having attained his majority, repudiated the lease, and with his brother and sister, effected a partition of the property to which the company were not parties, the plaintiff being assigned the central one-third, and the brother and sister the easterly and westerly one-thirds respectively, the deeds purporting to make a division of the entire estate and to absolutely vest in the parties thereto their respective properties:—

Held, affirming the judgment of TEETZEL, J., at the trial that the defendants were guilty of ouster in that they had practically excluded the plaintiff from possession, and he was therefore entitled to mesne profits since he became of age, and that they were also guilty of active or commissive waste in pulling down and removing the buildings, and in cutting down trees and shrubs, and that he was entitled to damages therefor, but that they were not liable for scouring or wearing away the banks on the lake front, for this was at most permissive waste for which neither a tenant for life or a tenant in common was responsible; that as regards partition, the intention of the parties thereto was for a division of their reversionary interests only, after the expiration of the lease and not for an immediate partition, and the plaintiff therefore was entitled to have the deeds reformed so as to carry out such intention, but that during the course of the lease the more equitable partition would be to give the plaintiff the easterly one-third portion, and the company the remainder.

Evidence taken at a previous trial when the action was directed to stand adjourned to add parties and amend pleadings, and before the Master under a reference, was under the circumstances, held not to be admissible.

Per TEETZEL, J., the lease did not come within the Settled Estates Act so as to be binding on the plaintiff thereunder.

THIS was an appeal by the defendants the railway company, from a judgment of Teetzel, J., delivered after the trial without a jury.

The plaintiff, while an infant, joined with his father, who was the tenant for life, and with his adult brother and sister, (who, with himself, took the reversionary estate on the father's

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death), in a lease to the defendants, a street railway company, of a property in which all three were tenants in common, for a period of ten years. The company thereupon pulled down some old buildings, put up pavilions, made roads and paths and turned it into a pleasure ground. They also ran a branch of their electric railway into it by which large crowds of people were brought there. During the term of the lease the father died and the plaintiff coming of age he at once repudiated the lease and effected a partition of the property with his brother and sister, to which the railway company were not parties, the plaintiff being assigned the central one-third and the brother and sister the easterly and westerly one-thirds respectively, the partition deeds making no reference to the company or the lease, but purporting to make a division of the entire estate and to vest absolutely in the parties thereto their respective one-thirds. The company paid the other two owners each one-third of the rent reserved by the lease, and offered to pay the plaintiff the other one-third, but he refused to accept it, and brought an action against the company for possession of the portion of the lands which had been conveyed to him in severalty by the other tenants in common; and for a declaration that the partition might be declared binding on the defendants; for a declaration that the lease was not binding on him, and for a declaration that he had been excluded from possession; and claimed to be entitled to recover mesne profits since he attained his majority and had repudiated the lease; and for damages and such further relief as he might be entitled to.

At the trial of the action before Meredith, C.J.C.P., without a jury, the learned Chief Justice, while of opinion that the defendants were not bound by the partition, considered that the action was defectively constituted in that the plaintiff's brother and sister were not parties, and he directed the action to stand over for judgment, and, on its coming on for judgment, entered judgment declaring that the action was defectively constituted, and ordered that it should stand adjourned, with liberty to the plaintiff to amend the pleadings and proceedings by adding his co-tenants as parties, and otherwise to amend the statement of claim as he might be advised, with liberty to the

defendants to amend their defence as they might be advised, and reserving the question of costs of the amendments and postponement of the trial to be disposed of by the judge before whom the action should be ultimately tried; but, in case the plaintiff failed to amend before the 28th February next following, the action was dismissed with costs to be paid by the plaintiff.

The plaintiff refused to amend, and appealed to the Divisional Court.

The judgment of the Divisional Court was that the company was not bound by the partition; that the brother and sister were not necessary parties; that the company's conduct in the use of park was practically an exclusion of the plaintiff from any use that he might make of it, and that he was entitled to recover mesne profits from the time he became of age and damages; and a partition was ordered between him and the company for the residue of the term, and a reference was directed to fix the mesne profits and damages.

The judgment is reported in 4 O.L.R. 36.

From this judgment the defendant company appealed to the Court of Appeal, who held that the brother and sister were necessary parties, and that the appeal should therefore be allowed and the judgment of Meredith, C.J., restored. The plaintiff to have one month to add parties and to amend in accordance with the judgment of Meredith, C.J. See report in 5 O.L.R. 483.

While the appeal to the Court of Appeal was pending, the plaintiff proceeded with the reference before the Master. A motion was then made to Street, J., to stay the reference, which he dismissed. Whereupon there was an appeal by the defendants to the Divisional Court when the order of Street, J., was reversed and the reference stayed. See 5 O.L.R. 15.

The plaintiff then amended by adding his brother and sister, Francis John Monroe and Amy Monroe, and otherwise amended the statement of claim; and the defendants also amended their statement of defence. The facts relating thereto are set out in the judgment of Teetzel J.

The action came on for trial before TEETZEL, J., on September 10, 1903.

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The additional evidence, so far as material, is set out in the judgment.

The evidence taken at the previous trial and the evidence taken before the Master in Ordinary under the reference to him directed by the judgment of the Divisional Court, which was afterwards reversed by the Court of Appeal, was admitted by the learned Judge against objection thereto made by the railway company.

F. Arnoldi, K.C., and *I. F. Hellmuth*, K.C., for the plaintiff.
J. Bicknell, K.C., and *J. W. Bain*, for the defendants.

The learned Judge reserved his decision, and subsequently delivered the following judgment:—

January 4th, 1904. TEETZEL, J.:—The disposition of this case involves the consideration of the following questions raised in the pleadings and at the trial:—

1. Is the lease binding upon the plaintiff by virtue of the Settled Estates Act?
2. If it is not, has the company ousted the plaintiff from possession, or his right to possession as tenant in common of an undivided one-third interest in the property;
3. If the company has been guilty of ouster, what allowance should be made the plaintiff for mesne profits;
4. Has the company committed waste, and, if so, to what damage therefor is the plaintiff entitled;
5. What is the effect of the deed of partition upon the rights of all parties;
6. Is the plaintiff entitled to a reformation of said deed, as claimed in paragraph 12 of the amended statement of claim;
7. If reformation is necessary and is granted, how should the limited estate in the lands be partitioned, as between the plaintiff and the company;
8. What relief, if any, has the company, as plaintiff by counter claim, against the Monros?

The property is known as *Monro Park*, and a lease thereof was made by the plaintiff's father, *George Monro*, who was a life tenant, the plaintiff, then an infant, and his brother, *Francis J. Monro*, and his sister, *Amy Monro*, as tenants in common of

the reversion, and is dated 1st May, 1896, for a term of ten years, to be computed from the first of April, 1896, and should George Monro survive the first of April, 1906, for a further term of the life of George Monro.

The plaintiff on attaining his majority repudiated the lease, as he had a right to do, unless it comes within the provisions of the Settled Estates Act, R.S.O. 1897 ch. 71, sec. 42.

The lease does not purport upon its face to be made under the powers given by the said Act to life tenants, and instead of there being any intention on the part of the life tenant to bind the infant reversioner by the lease, it is expressly declared and agreed between the lessors and lessee that none of the lessors is to be liable for any repudiation of the lease by the plaintiff on or after his majority, which seems to me to negative any intention to exercise the binding power conferred by the Act.

In order that any such lease by a life tenant shall be binding upon the reversioner, the Settled Estates Act, sec. 42, contains the following proviso: "Provided that such demise is not made without impeachment of waste and does not authorize the cutting of any timber or felling of any trees except in the ordinary course of husbandry."

Now the lease in question, while containing a covenant that the company shall not cut down, injure or destroy any timber shrubs or timber trees, contains this exception, namely: "except for the purpose of preparation for and use of the said lands and premises for a park and pleasure resort as hereinafter mentioned. But this exception is not to include trees of a trunk diameter of five inches and upwards unless such tree or trees are required to be removed to give way for a street railway track or a building to be laid or erected, etc., and for each tree having a trunk diameter of five inches and upwards cut down in defiance of this covenant the lessors in addition to other remedies are to be forthwith entitled to payment of \$100 therefrom from the lessee and its successors." And the lease further provides that the premises are being acquired by the company for park and pleasure grounds only, and the company is granted the privilege of improving and laying out the said lands as a park and public resort and may make paths, walks and other

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alterations, etc., which it may think expedient for the pleasant, convenient and profitable use of the lands, etc., and in all alterations to be made the timber, shrubs and present character of the lands and premises shall be changed and altered as little as possible. The lease also provides that such proposed alterations, etc., shall be submitted to George Monro during his life, and after his death to his solicitor for his approval, and in case of disagreement to a referee, etc.

The lease is made in pursuance of the Act respecting Short Forms of Leases, and contains the statutory covenant as to repairs.

In *Davis v. Davies* (1888). 38 Ch. D. 499, it was decided in a case under the English Act containing similar language as to impeachment of waste, that a lease by a tenant for life exempting the lessee from liability for "fair wear and tear and damage by tempest" is void as "made without impeachment of waste."

I think upon this authority I must hold that this lease, as against the plaintiff, is not binding under the provisions of the Settled Estates Act.

On the question of ouster, I adopt the view expressed in this case by Street, J., in Divisional Court, 4 O.L.R., pp. 41-42, where substantially the same evidence at a former trial was before the Court, and I find that the plaintiff was practically excluded by the defendant company from any use he could possibly make of the property and is therefore entitled to mesne profits since he became of age, 10th August, 1900.

As to the amount to be paid for these profits, I think, having regard to the evidence as to the rental valuation of Victoria Park and Monro Park, and the condition and uses made of the property by the defendant company that the sum of \$300 per annum would be a fair allowance to the plaintiff in respect of his interest in the property.

I also think the plaintiff is entitled to damages for active or commissive waste committed by the defendant company in tearing down and removing the barn and other outbuildings and in cutting down shrubs or trees. The evidence of the amount of this damage was not very satisfactory, but I think \$50 is a fair sum to allow the plaintiff in respect thereof. The residence was removed to another part of the premises, but I find there

was no evidence of damage occasioned thereby. The claim of the plaintiff for damages for the scouring or wearing away of the lake banks by the throngs of people brought upon the property by the defendant company in the course of its user thereof as a park property I do not think can be allowed, for the reason that, in my opinion, such waste, if any, was not wilful or commissive, but, at most, permissive waste, for which neither a life tenant or tenant in common is responsible. See *Re Cartwright* (1889), 41 Ch. D. 532; *Re Parry and Hopkin*, [1900] 1 Ch. 160; *Patterson v. Central Canada* (1898), 29 O.R. 134; *Hole v. Thomas* (1802), 7 Ves. 589; *Bewes Law of Waste*, pp. 263-267; *Foster on Joint Ownership* 17; *Encyclopædia of the Laws of England*, vol. 12, p. 541.

The most perplexing questions in this case arise in connection with the deed of partition executed by the Monros on the 16th November, 1900, and these have been already incidentally considered by the Divisional Court and the Court of Appeal on appeal from the first trial herein, 4 O.L.R. 36 and 5 O.L.R. 483, resulting in conflicting views of construction.

Pursuant to the decision of the Court of Appeal, the plaintiff added Francis J. Monro and Amy Monro as defendants and amended his statement of claim accordingly, and inserted the following paragraph:—

“12. It was intended by all the parties to the said partition deed to divide between themselves equal interests in the said lands, and that the said partition should be of the reversionary interests of the defendants Francis John Monro and Amy Monro in Monro Park after the expiration of the lease to the defendant railway company hereinbefore mentioned, and an equal interest of the plaintiff in the said lands after the expiration of the said lease and so as not to affect the undivided one-third interest of the plaintiff as tenant in common with the defendant railway company of Monro Park for the residue of its term under its lease from its co-defendants, but some of the learned Judges of the Court of Appeal for Ontario have found in this action that the said deed does not carry out the said intention, and if so, the said deed does not express and embody the real intention of the parties thereto, and does not have the effect the draughtsman of it intended it should have, and if the

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said deed has the effect that it was interpreted to have by the said Judges, the same arose from the common error and mutual mistake of all the parties thereto, and the same should be rectified to conform with what was intended by it."

And the plaintiff claims *inter alia* a declaration that he is entitled to an undivided one-third interest and the defendant company an undivided two-thirds interest in Monro Park for the residue of its term under the said lease, and if necessary a reformation or interpretation of the said deed of partition to effect that; and also a declaration that the partition between plaintiff and the Monro defendants was intended and is a fair and equitable partition between the parties thereto, and that the defendant company should be confined to the lands partitioned to its co-defendants, or in the alternative a partition of the said lands with the company for the residue of its term.

The Monro defendants admit the statements contained in paragraph 12 and submit their rights to the Court.

The deed of partition makes no reference to the company or its lease, but purports to be a division of the entire estate in the lands, and vests a distinct portion in each of the three, the central portion or third in the plaintiff and the easterly and westerly portions or thirds in the defendants Francis J. Monro and Amy Monro respectively.

After this deed was executed, the plaintiff through his solicitor demanded from the company possession of his portion, having construed his rights under the deed as entitling him to the exclusive occupation of the central portion not only as against his grantors but as against the company. That this construction was erroneous and that the partition deed was not binding on the company has already been decided in all the courts in the action as originally constituted.

Following the effect of the partition deed as construed in the Court of Appeal, I think it is clear that without a reformation thereof the plaintiff would not be entitled to a partition of the limited estate in the whole of the lands which before the deed he and the company owned in common. I am also satisfied that none of the parties to the deed ever intended that it should have such an effect, but that their intention was, as stated in paragraph 12 of the statement of claim, as above cited,

and that the omission to insert the necessary language to express that intention was the result of common error and mutual mistake of all the parties thereto, and the deed therefore should be reformed so as to clearly express such intention.

Then as to the partition of the limited estate in the lands between the plaintiff and defendant company during the balance of the lease. Having regard to the evidence adduced, at the former and present trials and before the Master, and the plaintiff desiring me to make the partition, instead of again referring the same, I think it would be manifestly unjust that the partition of the reversion as made by the Monros should be adopted, as between the plaintiff and the company.

The company has erected its principal buildings and all its railway tracks on the central and westerly portions, and the portions allotted to them ought to be contiguous in order that they may reasonably enjoy their property for park purposes.

In my opinion, the most equitable partition would be to allot to the plaintiff the easterly portion and to the company the central and westerly portions as described in the Monro partition deed. The plaintiff being the owner in fee of the reversion in the central portion will receive from the company the aliquot part of the rent payable in reference to that portion, and he will pay to Francis J. Monro, the owner of the reversion in the easterly portion, the amount he (plaintiff) receives from the company in respect of the central portion from the date he gets possession of his portion until the end of the lease.

The remaining question is as to the rights of the company as against the Monros on the counter-claim, the same having been dismissed by consent as against Mr. Millar, who was made co-defendant therein.

In my opinion, the evidence fails to establish any malicious or improper combination between the defendants, as alleged by the company, nor was there any evidence entitling the company to an amendment of the lease or to be absolved therefrom, or to damages for breach of covenant for quiet enjoyment as prayed in the counter-claim, and the same should therefore be dismissed.

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From this judgment the defendant company appealed to the Court of Appeal.

On May, 25th, 1904, the appeal was heard before MOSS, C.J.O., OSLER, MACLENNAN, GARROW and MACLAREN, J.J.A.

J. Bicknell, K.C., and *J. W. Bain*, for the appellants.

F. Arnoldi, K.C., and *G. F. Shepley*, K.C., for the respondents.

November 14th, 1904. The judgment of the Court was delivered by MOSS, C. J. O.:—The previous history of this action is to be found on reference to 4 O.L.R. 36 and 5 O.L.R. 15 and 483. Pursuant to the leave granted by the judgment of this Court the plaintiff amended by adding Francis John Monro and Amy Monro as parties defendants and setting forth that the object and intention of the plaintiff and his brother and sister in agreeing to the partition among themselves was to divide the lands in equal interests, and that the partition should be of the reversionary interests of the plaintiff's brother and sister and of the plaintiff's estate after the expiration of the lease held by the defendants, so that such partition should not affect the plaintiff's position as tenant in common of the whole with the defendants the railway company, for the residue of the term of the lease, and by praying that if necessary the conveyance made for the purpose of giving effect to the partition might be reformed so as to preserve to the plaintiff all his estate rights and interests as tenant in common with the railway company, and that a partition be made of the lands with the railway company for the residue of the term, and for other specified relief, including mesne profits and damages.

The newly added defendants substantially admitted the truth of the statement of claim, and submitted their rights to the Court.

The defendants the railway company, by their amended defence insisted upon the validity of the lease and that it was binding on the plaintiff as a lease of a settled estate within the meaning of the Settled Estates Act; claimed to be entitled to an allowance for improvements made by them on the lands; claimed the benefit of the conveyance by way of partition between the

plaintiff and his brother and sister, and denied the plaintiff's right to a reformation thereof. They also counterclaimed but the counterclaim was dismissed and no appeal is made in respect of it.

At the trial Teetzel, J., admitted as evidence, against objection on behalf of the railway company, the evidence taken at the previous trial and the evidence taken before the Master in Ordinary under the reference to him directed by the judgment of the Divisional Court, which was afterwards reversed in this Court.

From the report of the discussion which took place when the latter evidence was tendered and received, it appears that the parties desired or were willing that all questions, including the setting apart of the shares of the land between the plaintiff and the railway company, and the ascertaining of the quantum of mesne profits and damages, should be disposed of without a reference.

But the objection made on behalf of the railway company was that the evidence tendered had been taken in the Master's office while there was a stay of proceedings and under a judgment which was subsequently reversed, and that the witnesses were not dead or out of the country.

Other testimony was adduced before the learned trial Judge bearing on the same matters as the testimony tendered and received, as well as on the new issues raised by the amended pleadings.

The learned trial Judge found and declared that the lease was not binding on the plaintiff; that the partition deed should be reformed; that the railway company had ousted the plaintiff from his possession in common with the company; that the railway company should pay to the plaintiff \$50 for damages for ouster and for mesne profits at \$300 a year; that the estate be partitioned by giving to the plaintiff the most easterly one-third and to the railway company the remaining two-thirds; and that the counterclaim be dismissed.

As to costs, he directed that no costs of the first trial be allowed; that the railway company pay three-fourths of the costs of the reference and of the appeals and motion with regard thereto; that the plaintiff pay the costs of Francis John Monro

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and Amy Monro up to and inclusive of their statement of defence ; that the railway company pay the costs of the counterclaim, and that, except as above limited, the railway company pay the plaintiff his general costs of the action.

The railway company does not complain of the disposition made of the counterclaim or of the costs as between the plaintiff and Francis John Monro and Amy Monro, but attacks the judgment on various grounds. The defence that the lease was valid and binding on the plaintiff under the Settled Estates Act is not repeated in the reasons for appeal, and on the argument counsel for the railway company stated that he did not press it, at least in this Court.

It was strongly urged that no case had been made for reformation of the conveyance and that the railway company ought not to be deprived of any benefit which it had derived thereunder.

But it is manifest as well from the testimony as from the whole circumstances that there was no intention on the part of any of the parties to the conveyance to take from the plaintiff any part of his rights as the owner of an undivided one-third of the premises, or to give any of his property or rights to his brother and sister so as to increase their property and rights and leave him with less than each of them was to have. Neither his brother or sister claim that there was any such intention or that they understood that to be the effect of the conveyance..

The evidence of the solicitor who acted for the plaintiff and prepared the conveyance goes to shew that the only object was to make a partition leaving the lease to stand as it then stood. It was not intended to affect the railway company as lessees of two undivided one-third shares. And if the general words of grant and release contained in the conveyance operate to take away from the plaintiff or to convey to his brother and sister any right of his in the premises during the existence of the term, it is proper and just to reform it so as to prevent it from so operating. The railway company cannot reasonably complain of this being done.

Throughout the litigation it has contended, and its contention has been upheld by all the Courts, that the partition made

was not binding on it. So far as the railway company was concerned it was *res inter alios acta*. Then as the railway company was not a party to or bound by it, how can it insist that the conveyance made must stand for its benefit even though it be shewn or admitted to be contrary to the intention of the parties to it? The railway company gave no new consideration, and their position has not altered. They hold their lease and their leasehold interest unaffected by the partition.

And if, acting in good faith, the parties to the conveyance had executed an instrument reciting that a mistake had been made in the former conveyance and making it clear that the plaintiff was to have and to hold during the term of the lease an undivided one-third interest in the whole of the premises as tenants in common with the railway company, it would be proper and just to declare the instrument effectual as against the railway company. The railway company would not be allowed to take for its benefit the property of the plaintiff because by mistake he had executed a conveyance which appeared to give rise to a claim to that effect.

Upon the facts as now disclosed the good faith of the parties must be taken as established. The railway company in their counterclaim made charges of combination or conspiracy with malicious intent to injure the railway company in its possession and rights under the lease, but they failed to support their charges, and it must be assumed that the plaintiff and his brother and sister were acting in good faith. And what they desired and intended neither prejudiced the railway company, nor did it furnish it with any defence to the plaintiff's claim to a partition of the premises during the term.

It was further objected that without the evidence given at the former trial and in the Master's office there was no evidence to support the charge of ouster of the plaintiff or on which to found the award of damages and mesne profits, and that the learned trial Judge ought not to have received that evidence.

For the plaintiff it is argued that as regards the evidence taken at the former trial there was only an adjournment of the trial and a continuation of it on the later occasion. A reference however to the judgment of Meredith, C.J., shews that he did not contemplate or direct an adjournment of the trial. An

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adjournment of a trial after it has been begun and evidence has been taken ordinarily means a resumption before the same Judge at the point where it had been left. In this instance the judgment pronounced directs that the action—not the trial—do stand adjourned to add parties and amend the pleadings. And in the next paragraph the costs are reserved to be disposed of by the Judge before whom the action is ultimately tried.

These provisions are entirely at variance with the notion that there was an adjournment of the trial so as to entitle the plaintiff to put in and use the evidence taken on the former occasion. The effect was the same as when a new trial is ordered. And unless by consent, or on proof of the death or absence from the jurisdiction and consequent inability to procure his attendance at the trial, the depositions of a witness taken at the former trial could not be received. And so with regard to the depositions taken in the Master's office.

None of the usual grounds for admitting any of the depositions were made, and the railway company refusing to consent, they were not admissible.

The question then is, whether the evidence given at the trial was in itself sufficient to support the judgment. It has already been pointed out that there is enough to remove all difficulty and objection based on the partition proceedings between the plaintiff and his brother and sister.

The partition made by the learned trial Judge is in accordance with the evidence, and appears to be fair and equitable as regards the railway company. It enables the company to make the best use of the premises for the purposes for which it acquired them and calls for the least disturbance of the present arrangements.

Whether or not there was an ouster is a mixed question of fact and law. From the date of his repudiation of the lease the plaintiff was entitled to possession of the whole of the premises in common with the railway company which was bound upon demand to let him into possession along with it. On the 17th August, 1900, the plaintiff wrote the railway company stating his repudiation of the lease and asking the company to give him immediate possession. This demand must be reasonably construed as a claim, not for the sole, but for the

joint possession, and it is apparent from the company's letter in reply of the 20th August that it was so understood.

The demand was not assented to, but it was sought to induce the plaintiff to confirm the lease and accept the rent under it. The railway company had at that time its buildings and track upon the premises, and after the demand it continued in possession and used the property in the same way as before. It is a fair inference from all the facts that there was a refusal to permit the plaintiff to enter. And when this action was brought there is not only a refusal of possession on the part of the railway company but there is a denial of his title. The lease is insisted upon as valid and binding upon him, and on argument the provisions of the Settled Estates Act were invoked against him. This is continued and made even more evident by the amended statement of defence. The railway thus puts itself in the position of one tenant in common in possession claiming the whole and denying possession to the other. These alone, without reference to the manner of the company's user of the premises which in itself amounts to a virtual exclusion, are acts and conduct from which an ouster may properly be inferred: *Doe d. Hellings v. Bird* (1809), 11 East 49; Freeman on Cotenancy, secs. 235-236.

Ouster being found, damages either as for trespass or by way of allowance for mesne profits should follow, and upon the evidence as to the value and rental of adjoining properties it cannot be said that the learned trial Judge has made an excessive award. Three hundred dollars a year is one hundred and thirty-three dollars and thirty-three cents a year more than one-third of the rental for the whole premises under the lease, but the evidence shews an increase in rental value since the date of the lease to the benefit of which the plaintiff is entitled, and the award should stand. There is some slight evidence of waste destructive of the freehold, and the amount awarded on this head (\$50) should not be disturbed.

There remains the questions as to the disposition made of the costs.

For the railway company it is argued that the learned trial Judge improperly awarded the general costs of the action to the plaintiff. This objection is placed on two grounds: first, that

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the litigation was due to the fault of the plaintiff; and secondly, that in any case a partition and consequent relief could have been obtained upon summary proceedings.

In view of the attitude assumed by the railway company it is difficult to see how it can be made to appear that the plaintiff was in fault in resorting to litigation. His rights were not admitted and he was being excluded from all enjoyment of the property.

As it turned out, it was even necessary for him to obtain a declaration that the lease was not binding upon him before he could proceed to obtain a partition or any other relief. For similar reasons and on similar grounds he could not have obtained relief in a summary proceeding. Upon the return of a notice of motion, and upon it appearing that the railway company was insisting upon defences such as have been set up here, the motion would have been refused and the plaintiff left to bring his action.

It does not appear that the learned trial Judge departed from any principle in dealing with these costs. But as regards the costs of the reference and the appeals and motions relating thereto, which by the certificate of this Court were reserved to be disposed of by the trial Judge, the matter is different.

The reference was directed by the order of the Divisional Court which was afterwards reversed in this Court. It had been proceeded with notwithstanding the stay of proceedings by reason of the pendency of the appeal.

The proceedings fell with the reversal of the order directing them. This Court dealt with the costs so far as to reserve them to be disposed of by the trial Judge in the hope that at the trial, or otherwise during the further conduct of the action, they might by the consent of all parties be made available and serviceable in saving further delay and costs. And it was thought that in that case the trial Judge, having all the facts before him and in view of the benefit or otherwise to any of the parties of these proceedings, would be in a position to deal with the costs in a more satisfactory way than they could otherwise be dealt with. Probably it would have been reasonable for the railway company to have consented to their being used, but the refusal was in the exercise of an undoubted right.

The result is that the proceedings have turned out to be useless and the plaintiff, at whose instance they were taken, is not entitled to any of the costs connected with them. On the other hand, if the railway company had been successful in their defence the costs would probably have been awarded to them as against the plaintiff. But considering that the railway company has failed in its defences, some of which should not have been set up at all, and having regard to all the other circumstances of the case, there should be no costs of the reference or of the motion and appeals with regard to it. Success on the appeal being but partial, there will be no costs except to the defendant Amy Monro, whose costs of the appeal must be paid by the railway company. She was not a party when the costs of the reference were incurred and cannot be held responsible for the judgment as to them.

The judgment appealed from will be varied to the extent indicated.

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[IN CHAMBERS.]

FELGATE V. HEGLER.

1904
Nov. 29.

Security for Costs — Father of Infant Suing as Next Friend and also Personally.

In an action brought by the father of an infant as his next friend, and also on his own behalf, for an injury sustained by the infant, the father residing out of, and the infant, within the jurisdiction, the father was directed to give the usual security for costs, and in default that his claim should be struck out.

MOTION for security for costs.

The action was brought by the father of an infant as next friend, and also on his own behalf, to recover damages resulting to the father and the infant from an injury to the infant for which it is alleged the defendants were liable.

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The father resided in England and the infant in this Province, as shewn by endorsement on writ of summons.

On November 26th, 1904, the motion was argued.

H. H. Clark, for the defendants.

C. W. Kerr, for the plaintiffs.

November 29. THE MASTER IN CHAMBERS:—The plaintiffs opposed the motion on three grounds:—(1) As premature, because it was not shewn on the material that the defendants had appeared in the action; (2) that an application should at least have been first made under Rule 1199 for a *præcipe* order; and (3) that inasmuch as the infant was within the jurisdiction, security for costs could not be ordered.

To the first objection I do not attach much weight. It was admitted on the argument that the defendants' solicitors had accepted service and undertaken to appear. It was not disputed that they had appeared. If necessary the defendants should have leave to file an affidavit proving this fact.

As to the second objection, I think this is not entitled to prevail. It is clear from the case of *McConnell v. Wakeford* (1890), 13 P.R. 455, that an order could not be made on *præcipe*—it "would have been void." There could, therefore, be no objection in making such an application.

The remaining ground of objection is more substantial. The facts of the present case are distinct from those in *Topping v. Everest* (1903), 2 O.W.R. 744; and *McBain v. Waterloo Manufacturing Co.* (1904), 8 O.L.R. 620. But it does not seem that the fact of the infant plaintiff being within the jurisdiction has any bearing on the point under consideration.

I am, therefore, bound by those previous decisions, unless the case of *Smith v. Silverthorne* (1893), 15 P.R. 197, following *D'Hormusgee v. Grey* (1882), 10 Q.B.D. 13, applies as was contended by Mr. Kerr.

It seems, however, to be clearly distinguishable. Here there are two distinct actions being brought against the defendants. This can now be done under Rule 185, in its present form, but there are none the less two separate actions.

The present motion will therefore be dealt with as was done in *Topping v. Everest*.

The plaintiff father can have such time as he may require (not exceeding six weeks) to give security. In default the claim of the father will be struck out and the matter will then be left for further consideration, or the order may be as in *McBain v. Waterloo Manufacturing Co.*, whichever is approved by the parties.

The costs of this motion will be in the cause, as the exact point now arises for the first time.

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CLARKSON V. BANK OF HAMILTON.

1904

Nov. 30.

Discovery—Corporation—Examination of Officer—Rule 439 (2.)

Where a corporation is a party to an action, and discovery is sought, it is reasonable and convenient that the corporation should suggest for examination the officer or servant best qualified to give the desired information, who should prepare himself for obtaining knowledge of all relevant facts.

In an action to set aside a chattel mortgage brought against an incorporated bank the examination of the general manager and the inspector disclosing that they were not conversant with the facts, an order was made under Rule 439 (2) for the examination of the local manager, who was present when the mortgage in question was given.

THIS was a motion for the examination under Rule 439 (2) of the agent of the defendants who was in charge of the Palmerston Branch, and was present at the giving of the mortgage in question in this action.

The plaintiff was the liquidator of the Palmerston Pork Packing Co., and as such brought an action to set aside a chattel mortgage given by the company to the defendants.

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On the 22nd of June the general manager of the defendants was examined for discovery. He knew nothing of the facts. Subsequently on 5th November inst. the inspector was examined with no better results. This motion was then made.

On November 24th, 1904, the motion was argued before the Master in Chambers.

D. Henderson supported the motion.

L. F. Stephens shewed cause.

November 30. THE MASTER IN CHAMBERS:—Where a corporation or other company is a party to an action it would seem reasonable and convenient that the company should suggest for examination the officer or servant best qualified to give all information to which the opposite party is entitled. Such officer should prepare himself by obtaining full knowledge of all relevant facts so that the examining party may be in as good a position as if contending with an individual.

That this is no more than the rules require is shewn by Bray's Digest of Law of Discovery (1904) at articles 17 & 18. The learned author refers to the following cases: *Southwark and Vauxhall Water Co. v. Quick* (1878), 3 Q.B.D. 315 at p. 321; *Bolckow v. Fisher* (1882), 10 Q.B.D. 161, 169, 171. These were followed and supplied in the recent case of *Welsbach Incandescent Gas Lighting Co. v. New Sunlight Incandescent Co.*, [1900] 2 Ch. 1.

The principle of these English decisions would seem to be *a fortiori* under our practice. There the answers of the officer to interrogatories can be read as admissions against the company; (*Welsbach Incandescent Gas Lighting Co. v. New Sunlight Incandescent Co.*, *supra* at p. 12 *per* Rigby, L.J.).

The only question for determination here is whether in such a case as the present the interrogating party has been given all the information to which he is entitled.

Mr. Turnbull, the general manager, knew nothing of the chattel mortgage having been given until after it was executed.

Mr. Watson, the inspector, knows nothing of what took place when the mortgage was made, as he had left Palmerston before

signature. He says that Mr. Hobson, their solicitor, and Mr. Campbell would know what was said and done at the time in question.

It appears from the plaintiff's affidavit that application was made to be allowed to examine Campbell, but refused by defendants. I, therefore, think the order should go with costs to plaintiff in the action. The following cases in our own courts seem to justify this disposition of the motion :

Hartnett v. Canada Mutual Aid Ins. Co. (1888), 12 P.R. 401 ; *Smith v. Clarke* (1887), 12 P.R. 217 ; *Goring v. London Mutual Fire Ins. Co.* (1885), 10 P.R. 642.

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[IN CHAMBERS.]

BARNUM v. HENRY.

1905

Jan. 11.

*Summary Judgment—Breach of Promise of Marriage—Evidence of Breach—
Motion to Dismiss Action—Con. Rule 616.*

A motion by defendant, under Con. Rule 616, to dismiss an action for breach of promise of marriage on the ground that the statement of claim did not allege a breach, and that the plaintiff on examination for discovery had admitted that there was no breach before action, was refused, the question whether there was such a breach or not being, in all the circumstances of the case, for the jury.

THIS was a motion by the defendant, under Rule 616,* to dismiss the action, on the ground that (1) the statement of

* (1) A party may, at any stage of an action, apply to the Court or a judge, for such order as he may, upon any admission of fact in the pleadings, or in the examination of any other party, be entitled to; and it shall not be necessary to wait for the determination of any other question between the parties; or he may so apply where the only evidence consists of documents and such affidavits as are necessary to prove their execution or identity without the necessity of any cross-examination; or he may so apply where infants are concerned, and evidence is necessary, so far only as they are concerned, for the purpose of proving facts which are not disputed.

(2) The foregoing Rules shall not apply to such applications, and any such application may be made by motion as soon as the right of the party applying to the relief claimed has appeared from the pleadings.

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claim does not allege that there was a breach of the alleged contract before action; and (2) that the plaintiff in her examination for discovery admits that there was not any breach before action.

The action was for breach of promise to marry the plaintiff. The marriage was to have taken place in July last, but at the request of defendant it was postponed.

The motion was heard by the Master in Chambers on January 5th, 1905.

W. C. Mackay, for the defendant.

J. T. Richardson, for the plaintiff.

January 11. THE MASTER IN CHAMBERS:—In answer to question 379 plaintiff says: "He did not fix any special day; we were to be married when my sister was here; he pleaded business, and said we could just as well be married in August; that is all that was said about it."

The marriage not having taken place in the first half of that month, the plaintiff became uneasy. She went to the defendant's house, but his sister said he was ill. Her mother afterwards went to see the defendant, and her stepfather also went, but failed to see him.

It is quite true that the plaintiff is not able to point to any specific and definite request to the defendant, made either by herself, her mother, or her stepfather, to marry her on any fixed day in August. The defendant has therefore argued that there was no breach, because there being no request, there could be no refusal; and that the action should therefore be dismissed.

As might be expected, the cases under Rule 616 are few. From *Cook v. Lemieux* (1885), 10 P.R. 577, to *Coyle v. Coyle* (1899), 19 P.R. 97, these applications, it is said, were to be granted only in the very clearest cases.

After reading through the whole of the plaintiff's depositions, I am not satisfied that the present is a proper case for applying the rule invoked.

In actions of this kind it cannot be necessary that a formal notice should be served on the suitor calling on him to perform

his contract, or that he should be required to do so by the plaintiff in a prepaid registered letter.

It is a well-known saying that actions speak louder than words. The whole conduct of the parties themselves, and of the mother and stepfather of the plaintiff, and of the defendant towards them, are, in my judgment, matters which must be left to the jury under the direction of the Judge at the trial. After hearing the plaintiff's case the presiding Judge will have to say whether or not there is any case to go to the jury—any evidence on which twelve (or ten) reasonable men could find that there was a breach by the defendant before action. To him I must leave it to decide.

The motion is, therefore, dismissed, with costs in the cause to the plaintiff.

I have not dealt with the first ground of the motion for the reasons given in *Knapp v. Carley* (1904), 7 O.L.R. 409.

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[DIVISIONAL COURT.]

READHEAD v. CANADIAN ORDER OF THE WOODMEN OF THE
WORLD.

1905

Jan. 11.

Discovery—Examination of Officer of Society—Head Office and Local Office.

An organization consisted of a head office called the "Head Camp" and a number of local branches called "subordinate camps," the Head Camp being composed of a delegate from each subordinate camp, and having eleven officers elected therefrom, while the subordinate camps had similar officers elected from their members, the Head Camp having absolute jurisdiction over all members. The members' dues were payable annually to the clerk of the subordinate camp, and handed to the banker, and remitted to the Head Camp, but no clerk or banker could be installed until they had given security to the satisfaction of the head managers of the Head Camp:—*Held*, that the clerk of a subordinate camp was an officer of the organization, and therefore subject to examination for discovery.

THIS was a motion by the defendants to set aside an appointment issued by the plaintiffs for the examination of one Harley Field as an officer of the defendants.

The defendants were a benevolent society, the head office of

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which was called the "Head Camp," and was located at London, and was the governing body. There was also a number of local camps called "subordinate camps," which were formed by the head camp, and from whom they obtained their charters. The plaintiff's son was a member of a subordinate camp located in Woodstock, and had an insurance upon his life, payable to the plaintiffs.

The son died in November, 1903.

The action was brought to recover the amount of the policy, and was commenced in March, 1904. No statement of claim was served until 27th June. The statement of defence was served on 2nd September. No reply was served.

The additional facts are set out in the judgment.

The motion was argued before the Master in Chambers, January 5th, 1905.

C. A. Moss, for the defendants.

J. W. Bain, for the plaintiffs.

January 11. THE MASTER IN CHAMBERS:—By the constitution of the defendants the governing body is the "Head Camp," which alone has power to form subordinate camps and issue charters to them.

The "Head Camp" consists of one delegate from each subordinate camp, and eleven officers who are elected every two years by the members from among their own number. This has absolute jurisdiction over all members. Every subordinate camp has similar officers who are elected annually by the members. These officers are paid by the subordinate camps such compensation as they see fit. The dues of the members are payable monthly to the clerk of the subordinate camp and handed to the banker. But no clerk or banker can be installed until they have given security to the satisfaction of the Head Camp's three head managers. The clerk and banker of the subordinate camps are the persons by whom the dues of the members are collected and remitted to the Head Camp.

In the present case Field is the clerk of the Woodstock Camp of which the deceased was a member. But he was not

the clerk during the lifetime of the insured. It is not easy to see what information he can give. But if he is the proper officer to examine he must prepare himself accordingly.

The question really seems to be whether the plaintiffs' solicitor is to go to London and examine one of the officers of the Head Camp, as the defendants contend; or whether their solicitor is to go to Woodstock, as the plaintiffs desire.

After reading through the by-laws of the order and the material, I think the plaintiffs' view is right, and that the clerk and banker of the subordinate camps are officers of the order and liable to examination.

The motion is therefore dismissed, with costs to plaintiffs in any event.

From this judgment the defendants appealed to a Judge in Chambers.

On January 20th, 1905, the same counsel appearing, the appeal was heard before MEREDITH, C.J.C.P., when it was dismissed with costs.

On January 30th, there was a further appeal to the Divisional Court, composed of BOYD, C., STREET and IDINGTON, JJ., the same counsel appearing, when the appeal was dismissed with costs.

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Feb. 20.

MUIR V. GUINANE.

Solicitor—Solicitors on the Record—Service on—Con. Rules 335, 358—Authority—Continuation of.

By reason of a change in the plaintiff's firm of solicitors an order for security for costs was not complied with and an order was made dismissing the action, on which, however, no judgment was entered. On the dismissal coming to the solicitors' knowledge, they gave notice of motion under Rule 358 to be allowed to put in security and proceed with the action, which was served on the defendant's solicitor to the record, who since the dismissal of the action had had no communication with defendant, he having left the Province without giving his address :—

Held, that the action was still pending, and that the service was good.

THIS was a motion by the plaintiffs for leave to put in security for costs and to proceed with the action.

On the 20th of December, 1904, the usual *præcipe* order for security for costs was taken out and served.

Owing to a change in the firm of the plaintiffs' solicitors the order was not complied with; and on the 18th January an order issued under Rule 1203* dismissing the action with costs but no judgment was entered or costs taxed.

On 23rd January this order came to the knowledge of the plaintiffs' solicitors, when they at once moved under Rule 358† to be allowed to put in security and proceed with the action.

This notice was served on defendant's solicitor (as appeared by admission endorsed thereon), but on the return of the motion on 28th January he stated that the defendant had been informed by him that the action had been dismissed, and that

* 1203. Where an order for security for costs provides that, in default of security being given, the cause or matter shall be dismissed with costs against a defendant, the Court or a Judge, upon default being made in giving security pursuant to the order, may, upon an *ex parte* application, order that the cause or matter be dismissed with costs against such defendant.

† 358. A party affected by an *ex parte* order, or any party who has failed to appear on an application through accident, or mistake, or insufficient notice of the application, may move to rescind or vary the order before the Judge or officer who made the same, or any Judge or officer having jurisdiction, within four days from the time when the order comes to his notice, or within such further time as the Court or a Judge may allow, and whether the order has been acted upon by the party issuing it or not.

defendant had left the Province, and without giving any address; and that he the solicitor did not consider himself any longer entitled to act.

The motion thereupon stood *sine die* to consider what was the proper course under these facts.

On February 16th, by the direction of the Master the matter was further argued.

A. R. Clute, for the plaintiffs.

S. B. Woods, for the defendant's solicitor.

February 20. THE MASTER IN CHAMBERS:—The whole matter was discussed in the case of *De la Pole v. Dick* (1885), 29 Ch.D. 351. It was there thought to be doubtful how long the solicitor on the record continued to represent the client under the English Rule corresponding to our Con. Rule 335.*

In 1893 the point again came up in *Rex v. Justices of Oxfordshire*, [1893] 2 Q.B. 149, in which as in *De la Pole v. Dick* (*supra*), Lord Bowen took part. It was there held unanimously that the retainer did not continue after the order had been made in that case. The decision seems to have been based on the ground that it was not a matter in the High Court, and therefore even the English Rule as it then stood did not apply. This had been amended in 1885 by the addition of the words, "until the final conclusion of the cause or matter, whether in the High Court or in the Court of Appeal." But no such amendment has been made to our Rule.

The point so far as can be ascertained is new. No authority was cited on either side beyond what is said in *Holmsted & Langton*, 2nd ed., in the notes on Rule 335 (see pp. 513-516).

It was argued that this application under Rule 358 is really an appeal. This seems to be correct. So that the point for decision is just what was raised in *De la Pole v. Dick*, where the head note reads, "Whether the solicitors on the record do not continue to represent their client until the expiration of the time allowed for appealing, *quære*."

* 335. A party suing or defending by a solicitor shall not be at liberty to change his solicitor in any action or matter without an order, which may be obtained on *præcipe*; and until such order is obtained and served, the former solicitor shall be considered the solicitor of the party.

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On this Lord Bowen said (p. 357), "It is not necessary in the present case to decide that point."

The inclination was apparently to answer the *quære* affirmatively, and I think it may be said that whenever judgment has been entered on default of either party, a possible remedy is provided by Rule 358. And that so long as that Rule can be invoked the action is still pending. In all such cases the motion has to be made in the action, which must therefore be viewed as still pending. Otherwise no motion could be made, and the only remedy would be by petition, if any remedy existed.

Then it follows that if the action is pending the solicitor on the record is still solicitor until a change has been made as directed in Rule 335.

The motion will therefore now be heard on the merits, as soon as the defendant can be heard from by his solicitor.

G. F. H.

[IN THE COURT OF APPEAL.]

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Jan. 23.

Penalties—Ontario Election Act—Bribery—Recovery of Penalty by Action.

The effect of the amendment of section 159 (2) R.S.O. 1897, ch. 9, made by 63 Vict. ch. 4 (O.) by which persons committing various forms of bribery enumerated in the section (*a* to *e* inclusive) become on conviction liable to a fine of \$200 and imprisonment is to take the penalties imposed by the amended clause out of the category of those which may be recovered by action under sec. 195.

Only one proceeding is contemplated by the amended section, and that is one in which both the penalty may be recovered and the imprisonment imposed.

Both must follow on the conviction in one and the same proceeding taken to enforce them. Imprisonment cannot be adjudged in an action under sec. 195 which intends a proceeding by action to recover the money penalty only.

Judgment by Boyd, C., which followed that of Britton, J., in *Carey v. Smith*, (1903), 5 O.L.R. 209, in dismissing the action varied: and the action held maintainable under sec. 195 only for penalties imposed by secs. 162, 163, 165, 166, 168.

THIS was an appeal by the plaintiff from a judgment of BOYD, C.

The action was brought to recover penalties under the Election Act, R.S.O. 1897, ch. 9. sec. 195.

A motion had been made by the defendants to strike out a certain paragraph of the statement of claim, upon the ground that no action lay in respect of the allegations therein made; upon the argument of which it appeared, that there was a question of law in the action which it would be convenient to have decided before any evidence was given or any issue of fact was tried, and an order was made under Con. Rule 259, that "the question whether upon the allegations contained in the statement of claim this action lies be decided before any evidence is given or issue of fact in the action tried, costs be costs in the cause to the successful party in the action."

The question was argued in Weekly Court on February 26th, 1904, before BOYD, C.

Aylesworth, K.C., for the plaintiff.

H. M. Mowat, K.C., for the defendant.

The learned Chancellor dismissed the action with costs, following *Carey v. Smith* (1903), 5 O.L.R. 209, considering

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himself bound by that decision and expressing no opinion of his own.

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From that judgment the plaintiff appealed to the Court of Appeal, and the appeal was argued on the 21st November, 1904, before MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, J.J.A.

Aylesworth, K.C., for the appeal. The offences alleged are infractions of sec. 159 of the Ontario Election Act, R.S.O. 1897, ch. 9. That section was amended by 63 Vict. ch. 4, sec. 21 (O), in respect to the punishment. In the former Act the offender was liable to a penalty. In the latter the offender was "on conviction" liable to a penalty and imprisonment. Britton, J., in *Carey v. Smith*, decided against the plaintiff's right to sue with a great deal of hesitation, and gave the defendant the benefit of any doubt, p. 215. If the defendant is only liable upon conviction, that would necessitate an indictment. The word "conviction" means "the state of being convinced," Standard Dict.; and "convict," means "to establish by evidence," which is the meaning to be attached here. Conviction does not mean only conviction for a crime but may be in the action for the penalty. Section 195 was not abrogated. I refer to *Wilde v. Bowen* (1875), 37 U.C.R. 504; *Re South Huron Election Case* (1878), 29 C.P. 301, at p. 305; *Re Dufferin Election Case* (1879), 4 A.R. 420.

H. M. Mowat, K.C., contra. The words, "on conviction," are not mere casual words. Conviction means "proving guilty of an offence charged against a party," Wharton's Law Dict.: *Eagan v. Jones* (1893), 32 Pac. Rep. 929; *In re Clark* (1894), 31 Atl. Rep. 522. The conviction should take place at the trial of the petition—a criminal court provided for by the Ontario Election Act.—The proceeding must take place under sec. 188. In *Wilde v. Bowen*, 37 U.C.R. 504, the appeal failed as the two presiding Judges differed and were far apart in their judgments. I refer also to *Queen v. Slaton* (1881), 8 Q.B.D. 267.

Aylesworth, in reply.

January 23. The judgment of the Court was delivered by OSLER, J.A.:—The action is brought for the recovery of penalties incurred for breaches of various provisions of the

Election Act of Ontario chiefly for different acts of bribery struck at by sec. 159 (1). These penalties are fixed by sub-sec. (2) of that section.

Penalties for other election offences imposed by other sections of the Act are also sued for, but these I pass over for the present as they stand on a different footing.

The principal question argued was, whether the pecuniary penalties provided for by sub-sec. (2) can be sued for and recovered in an action like the present, which is brought under sec. 195 of the Act, and the appeal, though in form from the decision of the Chancellor, is really brought for the purpose of asking the Court to review that of Britton, J., in *Carey v. Smith*, 5 O.L.R. 209, which the learned Chancellor followed without expressing any opinion of his own.

Section 159 (1) enacts that "the following persons shall be deemed guilty of bribery and shall be punished accordingly." Clauses (a) to (e) inclusive specify the various forms of bribery for which the persons committing them (bribers) are so punishable, and sub-sec. (2) enacts that "Every person so offending shall on conviction incur a penalty of \$200, and shall also be imprisoned for a term of six months with or without hard labour."

As this sub-section stood in the Election Act of 1892 (sec. 151) it provided simply that any person so offending should "incur a penalty of \$200." It took its present shape by the amendment of 63 Vict. ch. 4, sec. 21 (O.).

Section 160 should be referred to, which deals with the case of persons accepting bribes, and sub-sec. (2) enacts that such persons "shall in the discretion of the trial Judges be liable to imprisonment for a term not exceeding six months with or without hard labour, or to a penalty of not more than \$200, or to both."

The Act of 1892 merely provided that such persons should be liable to a penalty of \$200. It was amended as above by 63 Vict. ch. 4, sec. 22 (O.).

Section 195 enacts that subject to the provisions of secs. 187 and 188 all penalties imposed by this Act shall be recoverable with full costs of action, by any one who sues for the same in any of Her Majesty's Courts of Justice . . . and in

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default of payment of the amount which the offender is condemned to pay, within the period fixed by the Court, the offender shall be imprisoned in the common gaol until he has paid the amount which he has been so condemned to pay and the costs.

(2) It shall be sufficient for the plaintiff, in any such action, to allege . . . that the defendant is indebted to him in the sum of money demanded, and . . . the particular offence for which the action is brought, and that the defendant had acted contrary to law.

(3) The action shall be commenced within one year next after the act committed, or the omission complained of, and shall be tried by a Judge without a jury. No amendment was made in this section by the Act of 63 Vict. (O.).

In my opinion the effect of the amendment of sec. 159 (2) made by 63 Vict. ch. 4 (O.) is to take the penalties imposed by the amended clause out of the category of those which may be recovered by action under sec. 195. Only one proceeding is contemplated by the amended section, and that is one in which both the penalty may be recovered and the imprisonment imposed. The words "on conviction" precede both consequences which are to follow therefrom.

I am, however, with all respect, unable to agree with Britton, J., in holding—if that is what he does hold—that those words import that a prior conviction for the offence in some independent proceeding is a condition precedent to an action for the penalties under sec. 195, if in such an action the punishment of imprisonment may be awarded, which is to my mind the real difficulty. The phrase properly enough describes the result of judgment against the offender in whatever may be the appropriate form of proceeding. See *Wilde v. Bowen*, 37 U.C.R. 504, *per* Wilson, J., and the authorities there cited. He must of course be found guilty—convicted—before the punishments are adjudged, but if there is to be a prior conviction on some other proceeding, what is to be the consequence—what the punishment adjudged on that? None is provided for unless it be that specified in sub-sec. (2) itself, and therefore the words necessarily mean on conviction in the prosecution for the offence. You cannot attach the imprisonment to the

conviction and then sue for the penalty or *vice versâ*. Both must follow on the conviction in one and the same proceeding taken to enforce them, if I am right in thinking that only one such proceeding was intended.

Then what is that proceeding to be? Is it an action under sec. 195? Does imprisonment follow or can it be adjudged in such an action? I think not. Every word of that section seems to me to intend a proceeding by action to recover the money penalty alone, and not a proceeding in which the substantive punishment of imprisonment is sought or is to be imposed in addition to the penalty.

Under the Insolvent Act of 1875, secs. 136, 137, a person who had purchased goods on credit or procured accommodation or security, knowing, or having probable cause for believing himself to be insolvent, might be charged with fraud in the action brought by his creditor, and might be found and declared guilty of such fraud in the judgment in such action, and imprisonment was expressly authorized to be imposed and adjudged in such an action following such judgment. The action was brought for both purposes, to recover the debt and to have the punishment inflicted. Here there is great difficulty in saying that the words, "on conviction," in sec. 159 (2), are intended to refer to an adjudication in a civil action, when we find that by secs. 187 and 188 (to which the provisions of sec. 195 are expressly made subject) a forum and code of procedure are created for the prosecution and trial of election offences, including those under secs. 159 and 160, in which the Court is expressly empowered to award both the pecuniary penalty and the imprisonment: sec. 188, sub-sec. (14).

The reference to "the trial Judges" in sec. 160, sub-sec. (2), which provides for the punishment of persons accepting bribes, supports this conclusion as does also the fact that the legislature did not think proper when amending secs. 159 and 160 as above mentioned, to make any change in sec. 195 to meet the altered conditions. Where there cannot be a prosecution under secs. 187, 188, as in the case where no petition has been presented against the election, some other form of prosecution, as by indictment, may be followed in which under sec. 159 on conviction both punishments may be imposed.

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It is true that sub-sec. (14) of sec. 188 contemplates the case of an action having been brought for a penalty, which is also the subject of a prosecution under that section, but this in my view creates no difficulty, as there are numerous election offences for which a pecuniary penalty only is imposed, and for which therefore there is no reason why an action should not lie under sec. 195. Such are the penalties sued for in paragraph 14 of the statement of claim :—undue influence, sec. 166 :—paragraphs 16 and 19, corruptly providing refreshment to voters, sec. 162 :—paragraphs 17 and 20, corrupt treating, sec. 163 :—paragraph 21, hiring teams, sec. 165 :—paragraph 28, procuring persons to vote who had no right to vote, sec. 168. As to these I see no reason to hold that the action is not maintainable under sec. 195, and Britton, J., did not hold otherwise in *Carey v. Smith*.

The judgment below must therefore be varied in this respect. But as the point does not seem to have been called to the attention of the learned Chancellor, this should make no difference in the disposition of the costs of the appeal which should be borne by the appellant.

The costs of the motion before the Chancellor may be costs in the cause.

G. A. B.

[ANGLIN, J.]

THE CORPORATION OF THE CITY OF TORONTO

V.

THE TORONTO RAILWAY COMPANY.

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Nov. 10.

Dec. 3.

Street Railways—Toronto Railway Company—Extension of Railway—Time Tables—Open Cars—Heating—Night Cars—Rights of City as to—Specific Performance—63 Vict. ch. 102, secs. 1 and 5 (O.)

Under the agreement between the plaintiffs and defendants, which is set out in 53 Vict., ch. 99 (O), the right to determine what new lines should be established and laid down is vested in the city, and applies as well to the streets within the city as it existed at the time of the making of the agreement, as to the streets in the territory from time to time brought within it; and for the company's failure to establish and lay down such new lines, the city is not limited merely to the right provided for in the agreement of granting such privilege to others.

The right, under such agreement, to settle the time tables and to fix the routes of the cars, to determine when open cars should be taken off in the autumn or resumed in the spring, and as to when and how cars should be heated, is for the city engineer, subject to the approval of the city council. The city have no power to compel the company to continue to run after midnight any car which, having started before midnight, cannot in due course finish its route by that time.

On a special case stated in an action only such questions will be answered as must necessarily arise in the action.

The Court, therefore, in view of 63 Vict. ch. 102, secs. 1 and 5 (O.), being made applicable to the city declined to answer a question raised in a special case as to the right of the city to have specifically performed those provisions of the agreement herein found in its favour; and an expression of opinion previously given against granting such specific performance, following *Kingston v. Kingston Electric R. W. Co.* (1898), 25 A.R. 462, was withdrawn.

THIS was a special case which was argued before ANGLIN, J., sitting in the Weekly Court, on the 10th October, 1904.

The special case, so far as material, is set out in the judgment.

Christopher Robinson, K.C., and *James Fullerton*, K.C., for the plaintiffs.

W. Cassels, K.C., and *James Bicknell*, K.C., for the defendants.

November 10. ANGLIN, J.:—In an action pending in this Court issues are raised which involve the determination of the respective rights of the plaintiffs and defendants as to a number of matters affecting the operation of the Toronto Street Railway.

The solution of many of the questions as to which the parties differ depends upon the true construction of several

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provisions of the agreement under which the defendants acquired this valuable property. This agreement, including certain incorporated documents, was ratified and confirmed by Act of the Legislature of this Province, 55 Vict. ch. 99 (1892), and is to be found printed as a schedule to that statute.

To dispose as far as possible of such questions, counsel for both parties agreed to submit to the Court a special case.

This case, presented and argued before me in Weekly Court on the 10th of October, 1904, is in the following terms:—

“The parties desire, before proceeding to take further evidence in this case, to obtain the opinion of the Court upon certain questions of law arising on the construction of the agreement on which the action is brought. These questions are :

Is the city or the railway company, and which of them, on the proper construction of the agreement, entitled to determine, decide upon and direct :

1. What new lines shall be established and laid down, and tracks and service extended thereon by the company, whether on streets in the city as existing at the date of the agreement or as afterwards extended ?

2. What time-tables and routes shall be adopted and observed by the company ?

3. Whether, if so determined by the city engineer, with the approval of the city council, cars which start before midnight must finish the route on which they have so started, though it may require them to run after midnight ?

4. At what time the use of open cars shall be discontinued in the autumn and resumed in the spring, and when the cars should be provided with heating apparatus and heated ?

5. In the event of the decision of the Court being in favour of the city on any of the above questions, is the city entitled to a decree for specific performance as to the matter so decided, or in any and which of them ?

6. Is the privilege to the city to grant to another person or company, for failure of the company to establish and lay down new lines and to open same for traffic, or to extend the tracks and services upon any street or streets, as provided by the agreement, the only remedy the city can claim ?

The parties submit to the Court to say what answer or answers should be given according to law to each of the above questions, each party to have right to appeal."

In approaching the consideration of the agreement and incorporated conditions, I fully accept the proposition with which Mr. Cassels opened his argument, viz., that to manage the defendant company and its undertaking is the right and the duty of its directors. But inasmuch as this company exists for the purpose of operating the Toronto Street Railway under a public franchise, it must be self-evident that in regard to matters within their scope, the terms and conditions upon which the franchise itself is held, must govern the exercise of the rights which it confers. To these terms and conditions in such matters the management and control of the directorate of the defendant company must conform. To that extent their independence of action is restricted, their right of control is qualified.

The agreement under consideration is in substance the grant for a lengthened term of valuable rights upon the streets of the city of Toronto: the conditions incorporated in it are the terms upon which the defendants sought and acquired those rights. These documents must be taken to have been intended adequately to provide for the operation of a street railway in a large and rapidly growing city, and to ensure a service suited to its wants and satisfactory to citizens of reasonable expectations. Consistently with these requirements, it must be assumed that both parties contemplated an arrangement reasonably advantageous to the defendants as a commercial corporation. The agreement and conditions must be read in the light of these facts and in a broad and liberal spirit, the particular provisions being construed so as best to effectuate these general purposes where the language employed fairly permits of such construction.

That both parties had in view a single system of surface street railways for the entire city of Toronto for a period of 30 years is abundantly plain. The general scope and character of the agreement and conditions make this obvious. When this agreement was entered into, it was common knowledge that Toronto was growing rapidly. It is not possible to suppose

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that either party contemplated a separate street railway system for suburban districts, then outlying, which should come within the city limits. The company, desirous of preserving its monopoly against competition, in new territory as well as old; the city anxious to secure the advantages of a single system—both dealing not with the conditions of the moment, but with privileges to be enjoyed and services to be rendered for a period of 30 years, must be taken to have intended by the words, “in the city of Toronto,” whatever that phrase might describe at any time during such 30 year period.

I have no doubt that the provisions of this agreement, onerous as well as advantageous, were meant to apply, and do apply, to extensions of the city during the term of the agreement.

Upon examining the provisions of the conditions with regard to the matters covered by the first and the second questions of the special case, a striking contrast is apparent between clause 14—which in regard to new lines not only requires the approval of the city engineer’s *recommendation* by the city council, but also that the period within which such recommendation should be carried out by the company, shall “be fixed by by-law to be passed by a vote of two-thirds of all the members of the council”—and clauses 26, 27, and 28, under which the city engineer is to *determine* certain other matters, subject only to “approval by the city council,” presumably by the vote of a majority of the members present, not being fewer than a quorum. Why this difference? Why such provisions at all, if the railway company is entitled itself to decide what shall be done in respect to matters covered by these clauses? *

*14. The purchaser will be required to establish and lay down new lines, and to extend the tracks and street car service on such streets as may be from time to time recommended by the city engineer and approved by the city council, within such period as may be fixed by by-law to be passed by a vote of two-thirds of all the members of said council, and all such extensions and new lines shall be regulated by the same terms and conditions as relate to the existing system, and the right to operate the same shall terminate at the expiration of the term of this contract.

26. The speed and service necessary on each main line, part of same or branch, is to be determined by the city engineer and approved by the city council.

27. Day cars are to commence to run on all routes not later than 5.30 a.m., and to run until 12 o'clock midnight, at such intervals as the city engineer, with the approval of the city council, may from time to time determine.

28. Night cars shall be run on such routes and at such hours and intervals as may be deemed necessary by the city engineer and approved by the council.

The city engineer appears to hold in regard to the parties to this agreement a position not unlike that held by the architect between the owner and the contractor, under familiar provisions of building contracts. For the protection of the company, the agreement makes the recommendation or the determination of the city engineer a prerequisite to anything being demanded of the company. In the case of new lines and extensions the defendants are further protected by the provision that a by-law passed by a vote of two-thirds of all the members of the council shall fix the period within which the company will be required to carry out such recommendation.

Under clause 14, which governs the matters covered by the first question, it is the city council approving, and, by by-law passed by a vote of two-thirds of its members, fixing the time for compliance by the company with, a recommendation of the city engineer, which may "determine, decide upon and direct what new lines shall be established and laid down, and tracks and service extended thereon by the company, whether on streets in the city as existing at the date of the agreement or as afterwards extended."

Question number two relates to time-tables and routes. It is impossible to answer this question categorically. In respect to matters covered by clauses 26, 27 and 28 of the conditions, neither the city nor the railway company is entitled to "determine, decide upon and direct." It is the city engineer who has this right and duty; but his determination, before the company can be required to recognize or act upon it, must be approved by the city council.

Reading clauses 26, 27 and 28 of the conditions together, and having regard to the tenor of the whole agreement, I think the conclusion is inevitable that both time-tables and routes are within their purview. The city engineer cannot satisfactorily or efficiently exercise his right to determine speed, service, and intervals between cars, unless he also possesses power to decide upon and fix routes. His right to determine, with the approval of the city council, the "service" necessary upon all lines is unrestricted, and is quite wide enough to include the power to specify the routes to be established and maintained. Given the routes and the

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condition, No. 27, fixing the hours of starting and finishing the daily runs, the making of time-tables is nothing more than a convenient method of exercising the right to determine speed and intervals.

It is perhaps unnecessary to add that these powers should not be used in an arbitrary or unreasonable manner. Some sound discretion as to what is proper and reasonable may naturally be expected of a gentleman whose qualifications fit him to be city engineer of a city such as Toronto. Upon the fair exercise of that discretion, those who were in charge of the interests of the defendants when this agreement was framed seem to have been fully prepared to rely.

The third question has caused me some difficulty. Provision is already made, by a judgment of this Court, referred to in argument and put in for my guidance, for transfers from day to night cars, and *vice versa*. Fares on night cars are double the ordinary maximum single rate fares (clause 30).

By sec. 17 of the statute it is enacted that "the fare of every passenger shall be due and payable on entering the car or other conveyance of the company."

Clause 27 of the conditions provides that "day cars are to commence running at 5.30 a.m. and to run until 12 o'clock midnight." There is nothing to prevent the city engineer, under clause 28, requiring "night cars" to be provided in such numbers and running upon such routes and at such intervals as may be requisite to carry to their destination all passengers who may be unable to finish their journeys in day cars. He may so arrange his time-tables that all day cars will "run in" from transfer points.

I can find nothing in the agreement itself, or in the working out of its provisions as to day and night cars which would enable me to say that it entitles the city to require the company to run after midnight any car which, having started as a day car, cannot in due course finish its route by that hour.

This is a matter in respect to which, by the exercise of a little good sense, an arrangement satisfactory to both parties could readily be made. As the fare is, by statute, payable on entering the car, and the company is bound to transfer passengers from day to night cars, an arrangement that all cars

on the road at midnight should *eo instanti* cease to be day cars, and becoming night cars should, as such, continue their routes, and that all passengers entering such cars after midnight should pay 10 cent fares, would probably meet the requirements of both parties, and should present no greater difficulty in operation than the practice prevailing in regard to limited tickets.

The third question as put in the special case, however, must be answered as contended for by counsel for the defendants.

If required to say by what test or in what manner the proper authority is to determine when the use of open cars shall be discontinued in the fall and resumed in the spring, and when the cars should be provided with heating apparatus and heated, I might find it difficult to answer. These, however, are in my opinion matters of "service" within the purview of condition No. 26, and the city engineer is authorized thereby to determine them with the approval of the city council.

With regard to the fifth question, the learned counsel for the plaintiffs virtually conceded that unless I felt at liberty, in view of the decision of the Court of Appeal in England, in *Mayor, etc., Wolverhampton v. Emmons*, [1901] 1 K. B. 515, to decline to follow the decision of our own Court of Appeal in *Kingston v. Kingston Electric R.W. Co.* (1898), 25 A.R. 462, this question must be answered in the negative. That this latter decision is in point could not, I think, be successfully controverted. But for a recent enactment of the Ontario Legislature, I might, upon the authority of *Trimble v. Hill* (1879), 5 App. Cas. 342, 344, if I thought this case within the principles enunciated in *Wolverhampton v. Emmons*, have followed that decision. But in my opinion sec. 81 of the Ontario Judicature Act (R.S.O. 1897, ch. 51), obliges me to follow the decision of the Ontario Court of Appeal, notwithstanding any later expression of opinion in any English court, except the Judicial Committee of the Privy Council.

Any expression of my own views as to whether *Wolverhampton v. Emmons* would in itself be authority for a decree of specific performance in regard to any of the matters covered by the present case would be purely academic, and for that reason should be withheld. Following *Kingston v. Kingston*

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Electric R.W. Co., as I deem myself bound to do, I answer the fifth question in the negative.

To answer the sixth question affirmatively would be in effect to declare that having covenanted, promised and agreed "to establish and lay down new lines and to extend the tracks and street car service as may be from time to time recommended by the city engineer," etc. (condition No. 14, and clause 12 of the agreement), the company nevertheless may at any time elect, in lieu of performing their covenant, to forfeit their exclusive rights to the extent provided by condition No. 17.* A not improbable consequence would be that the company would from time to time refuse to lay down tracks upon streets in sparsely populated outlying districts. Upon these streets, far distant one from another, no person or company could be found willing to undertake the operation of isolated lines of street railway. No rival system could be established, and, if it could, all the advantages of the single system throughout the city, contemplated by the arrangement between the city and the Toronto Railway Company, would be lost to the former. It is impossible to believe that the parties intended that the company should enjoy an option so entirely inconsistent with the manifest object and general tenor of the bargain which they made. Nor do I think any rule of construction requires me to hold that the city relinquished for such an illusory and shadowy alternative right, whatever substantial redress it would otherwise be entitled to claim for breaches of obligations which may be imposed upon the company under the provisions of condition No. 14. To question number six, I therefore make answer that "the privilege to the city to grant to another person or company for failure of the company to establish and lay down new lines and to open same for traffic, or to extend the tracks and service upon any street or streets as provided by the agreement, is not the only remedy the city can claim."

*17. In case the purchaser fails to establish and lay down any new line, as aforesaid, and to open the same for traffic, or to extend the tracks and services on any street or streets within such period as may be fixed by by-laws of the city council, to be passed as herein provided, the privilege of laying down such new lines or extensions on the street or portion of street so abandoned by the purchaser, may be granted by the said council to any other person or company, and the purchaser shall in such case have no claim against the city for compensation.

The special case is silent as to costs. To prevent future difficulty, however, so far as Con. Rule No. 1130 enables me to do so, I direct that the costs of and incidental to this special case, be costs in the cause in the pending action in which the case has been stated.

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December 3rd. ANGLIN, J.:—After I had delivered judgment upon the “special case” stated in this action, my attention was directed by Mr. Fullerton, of counsel for the plaintiffs, to certain statutory provisions in the nature of private legislation, which it was suggested might have a bearing upon the question presented as to the right of the plaintiffs to a decree for specific performance. This legislation, said to have been procured on behalf of the municipality to overcome the difficulty presented by the decision of the Court of Appeal in the *City of Kingston v. Kingston Electric Railway Company*, (1898) 25 A.R. 462, had not been alluded to in argument before me.

Under these circumstances I thought it advisable to stay the issue of formal judgment, to withdraw my opinion upon and answer to the fifth question submitted and to direct that the special case should again be placed upon the Weekly Court list in order that I should have the advantage of hearing counsel upon the scope and effect of these special statutory provisions: 63 Vict., ch. 102, secs. 1 and 5. (O).

Counsel for the plaintiffs state that their omission to refer to these provisions was not intentional. Mr. Robinson adds that, in his opinion, they cannot affect the judgment upon the fifth question in the special case. He points out that, before the plaintiffs can claim a decree for specific performance by virtue of this special legislation, they must give evidence that the conditions exist which impose obligations upon the defendants under their agreement with the plaintiffs and of the nature and extent of the breaches of such obligations, after which, in the exercise of its discretion, the Court is to determine what things, if done or forborne, would constitute a substantial compliance with such obligations and these things, when so determined, it shall order to be done or forborne.

Counsel for both parties state that the fifth question in the special case was propounded for the purpose of obtaining an

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adjudication upon the applicability of the decision in the Kingston case, and, should it be held to be in point, a review of that decision.

Had there been no such legislation as is contained in the statute, 63 Vic. ch. 102, the question, as framed, would necessarily have involved the determination which the parties avow it to be their desire to obtain. But it must be obvious that, if the plaintiffs should make out a case, as outlined by Mr. Robinson, entitling them to the benefit of this special legislation, it will be wholly unnecessary to consider the applicability or the authority of the decision in *Kingston v. Kingston Electric R. W. Co.*, 25 A.R. 462. Upon a special case stated in an action only such questions of law can properly be raised as must sooner or later arise in the action. *Republic of Bolivia v. National Bolivian Navigation Co.*, (1876) 24 W.R. 361.

To answer the fifth question so as to meet the real purpose of the parties in presenting it, I should be obliged to assume that the plaintiffs will fail to establish facts entitling them to invoke the special statutory provisions of 63 Vic. ch. 102. On the other hand, taking these provisions into account, at best only a hypothetical answer can be made to this question. It will be time enough to determine whether the remedy of specific performance is open to the plaintiffs under the statute when they have established a case to which the statute applies; time enough to consider their right to this relief apart from the statute, when it becomes clear that the statute has no application. At present the question propounded cannot be answered without disregarding the well established practice of this Court to decline to answer contingently questions involving problems which, in the ultimate working out of the action, may not present themselves for solution.

The Court is not bound to answer every question which parties litigant may see fit to put. *Viscount Barrington v. Liddell* (1852), 2 DeG. M. & G., 480, 506.

The undoubted right of the Court to decline to express "speculative opinions on hypothetical questions," or hypothetical opinions upon questions a categorical answer to which can only be given when certain facts, not admitted, have been established

by evidence, finds in the fifth question of the present special case a subject which compels its exercise.

For these reasons I feel obliged to refrain from answering this question.

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[DIVISIONAL COURT.]

THOMPSON V. THE CORPORATION OF THE CITY OF CHATHAM.

Municipal Corporations—Contract—By-law—Variation in Detail—Necessity for Further By-law.

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A contract for the performance of work for a municipal corporation executed under its corporate seal by virtue of a by-law passed therefor can be varied in an unimportant matter of detail, e.g., a modification in the mode of payment, without the necessity of passing a further by-law.

Where, therefore, a contract with a city for supplying dynamos and station systems for electric street lighting was, under the authority of a by-law, executed under the corporate seal, payment to be made on the approval of an engineer, who duly inspected and approved of the work subject only to re-armaturing, if such should be found necessary, within five years, it being arranged that a portion of the contract price should be retained as a guarantee therefor:—

Held, that the variation was effective without a further by-law being passed authorizing it.

THIS was an appeal from the judgment of his Honour Judge Winchester, Judge of the county court of the county of York, directing judgment to be entered for the plaintiffs.

The action was tried before him without a jury at Toronto on April 13th, 1904.

It was brought to recover \$400, being a balance of a sum of \$1,675, alleged to be due under a contract made with the defendants, the corporation of the city of Chatham, dated July 16th, 1897, for the supply of dynamos and station systems in connection with the electric street lighting of the city.

The contract was duly entered into by the corporation under its corporate seal by virtue of a by-law authorizing its execution.

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By its terms the work was to be performed by the plaintiffs subject to the approval of an engineer named by the defendants and agreed to by the plaintiffs. He was to test the work done and to accept or reject it and report his decision to the council. The engineer duly inspected the work and accepted it subject to one particular, namely, as to the armatures. The matter was then brought before the council, when a resolution was passed agreeing to the payment of \$1,675 upon a guarantee bond for five years to be approved of by the chairman of the finance and light committee, being given to the city for a sum to be named by the engineer, sufficient to indemnify the city against loss in case the armatures should burn out by reason of an inherent defect due to temperature or proper insulation, the plaintiffs undertaking to unwind them and insulate them with fire-proof insulators. The plaintiffs were of the opinion that the procuring of such a guarantee would cause unnecessary delay, and wrote to the defendants stating that they were willing the city should retain a sufficient sum out of the contract moneys for the purpose aforesaid. The matter was brought before the council when the clerk was directed to forward the plaintiffs' letter to the engineer. This was done, and a reply by telegram was received from him, stating that \$400 would be amply sufficient for the purpose. The chairman of the finance and light committee then directed \$400 to be retained and the balance paid over to the plaintiffs, which was done. At a subsequent meeting of the council the chairman made a report as to what had taken place, submitting the plaintiffs' letter, the clerk's letter, forwarding it to the engineer, and his telegram in reply, whereupon a resolution was passed approving of what had been done.

The plaintiffs claimed they were entitled to the \$400, as the five years in which their guarantee was to run had expired.

The defendants claimed that the only contract was that which had been executed under the by-law passed by the corporation, and that as no by-law had been passed for the alteration of it, such alteration was of no effect.

The learned county court Judge found in favour of the plaintiffs.

From the judgment the defendants appealed to the Divisional Court.

On January 20th the appeal was heard before BOYD, C., MACMAHON, and IDINGTON, JJ.

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E. E. A. DuVernet, for the appellants. The object of the contract was for the purpose of securing due performance of the work under the conditions and provisions set out in it, and was entered into under the corporate seal under authority conferred by by-law. It was one entire contract and the plaintiffs were only to be paid on the acceptance of the work by the engineer, and there never was any acceptance within the meaning of the contract. The plaintiffs cannot take advantage of the alleged modification of the contract, as it was not authorized by by-law.

L. H. Drayton, for the respondents. What took place here was merely a modification of the contract in a matter of detail, namely, as to the mode of payment, and no case has been cited, nor can any case be found, holding that such a modification cannot be made. The five years having elapsed within which the defendants were to retain the \$400, the plaintiffs are now entitled to recover it from the defendants.

January 28. BOYD, C. :—The question of law argued that this contract was manifested in and adopted by by-law, and could not be changed in some details, unless by means of another by-law, does not appear to be well founded, having regard to the circumstances and dealings in this case.

The contract had been completed to the satisfaction of the engineer named, and payment of the whole price recommended upon the furnishing of a written guarantee by the plaintiffs to make good certain defects, if they should develop within a given time. Had the bond been given the whole contract price of \$1,675 would have been then paid to the plaintiffs. But instead of the bond it was agreed on both sides that \$400 of the price should be retained by the corporation, to make good any such defects, if default was made by the plaintiffs in remedying the same. This could well be carried out without any further by-law. It was a mere modification of the manner of payment

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and the right to do so is more than covered in point of authority by *Canadian Pacific R.W. Co. v. Corporation of Chatham*, in its various stages, and as finally reported in 25 S.C.R. 68. In brief and in substantial effect the \$400 retained was the money of the plaintiffs, to be paid to them if no default was made within five years on their part in providing for the re-armaturing, and if the difficulty arose from inherent defects attributable to temperature or insulation.

That was a question of fact upon which there is no good reason to disagree with the conclusion reached by the Judge, after hearing the witnesses and a patient examination of the case as set forth in his written opinion.

I would affirm the judgment with costs.

IDINGTON, J.:—The judgment appealed from appears to me to be unassailable. I agree with the reasons given and the result arrived at.

We are asked to hold that a municipal corporation having entered into a contract (under seal) adopted by a by-law of the council, cannot be varied by anything done or submitted to by the council unless that variation be also supported by a by-law. The variation in question was a trifling matter of detail in carrying out the contract and adjusting the mode of final settlement thereof. None of the authorities cited support such a proposition of law. None, I venture to say, can be found maintaining so remarkable a proposition in relation to our municipal corporations.

It was also claimed upon the argument by defendants' counsel as a result of this proposition that the plaintiffs were bound by the terms of the original contract to satisfy the city engineer and, therefore, it was urged that until this was shewn the plaintiffs could not recover. In short, it is claimed that the council could not dispense with the form of engineer's approval though he advised the course that the council adopted. The contract contained the following: "Should the contractor neglect or be unable to permanently and satisfactorily rectify any points not in compliance with these specifications, he will be required to remove part or the whole of the materials

supplied under this contract at his own expense and at the convenience of the lighting committee of the town council."

This the defendants never required to be done. They retained and used the parts of the material now complained of, for about five years after the last rectification (on any point their council required rectification by plaintiffs) had been done.

I think the learned trial Judge could have rested his judgment on this feature of the contract and the defendants' actions in the premises, if he had felt forced by law to confine himself to the interpretation of the terms of the contract and to discard what transpired between the parties as varying it or otherwise satisfying it.

The only result of accepting the contention of defendants, that the adoption by the defendants' council of the arrangement entered into by the defendants' mayor and committee on the recommendation of their engineer, should be treated as naught, would be to deprive defendants of the supplementary guarantee furnished by the agreement to leave the \$400 balance in defendants' treasury for five years. It is futile to say that this arrangement was not authorized, for it clearly was adopted by the council as their minutes shew by the adoption of the committee's report. This guarantee, as well as the original provisions for securing due fulfilment of the contract, clearly proceeded upon the intention of notice being given plaintiffs, of anything occurring within the terms of either, in the execution of the work needing rectification. If the defendants chose instead of this to incur expense, they must bear such expense. And as to the alleged breach of either warranty there is no such evidence to support it and the claim for damages as can be safely relied upon.

I think the appeal must be dismissed with costs.

MACMAHON, J., concurred.

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Dec. 19.

Will—Gift for Life—Right to Corpus—Codicil.

Under a will, among other matters, the executors were to hold the estate in trust to pay testator's wife \$600 annually, which was to be duly secured to her; his son to be paid for five years after his death the income derived from the rest of his estate, and on the expiration of such period the principal thereof, reserving however a sufficient sum to secure the payment of the \$600, and on his wife's death they were directed to pay to his said son all the rest and residue of his property. By a codicil, in addition to securing the payment of the \$600, his executors were directed to retain and invest a sum of \$10,000 and to pay to his said son the income thereof during his lifetime, and after his death to pay the principal to such persons as the son should by will direct:—

Held, that under the codicil alone the son would only take a life interest in the \$10,000, but when read in connection with the will he took the amount absolutely.

THIS was a motion for the construction of a codicil to the will of Clark Hanmer, whereby his trustees were directed to retain and invest the sum of \$10,000, and to pay the income thereof to the testator's son, Louis, during his natural life, and, upon Louis' death, to pay the corpus to such persons as he should by his last will direct that sum to be paid to.

The will of the testator was as follows:

By the first clause he directed the payment of his just debts, funeral and testamentary expenses.

By the second clause he gave all his property to his executors upon trust (a) to permit his wife to have his residence, describing it, during her natural life; (b) to pay her the sum of \$600 annually, and to see that such payment was secured; (c) to pay his son Louis E. Hanmer for five years after his death all the rest of the interest and annual profits of his estate; (d) and at the expiration of such five years to pay to his said son the principal of his said estate, reserving however such sum as should be amply sufficient to secure to his said wife the said annual payment of \$600; (e) and that, upon the death of his said wife, to pay and convey to his said son Louis all the rest and residue of his property.

By the third clause he directed that his wife should accept the benefits conferred on her in lieu of dower.

And he appointed his said son Louis, Charles G. Ross and Henry S. Cane to be his executors.

By the codicil to the will he altered clause (d) by directing his executors to retain in their hands and safely invest the sum of \$10,000 in addition to such sum as might be necessary to secure the payment of \$600 yearly to his wife; and to pay the interest arising from the \$10,000 to his son Louis E. Hanmer during his natural life, and on the death of his said son his executors were directed to pay the principal sum to such persons as his son should by his will direct.

The case was argued on 14th October, 1904, before ANGLIN, J.

S. B. Woods, for Louis E. Hanmer.

T. J. Robertson, for the executors.

December 19. ANGLIN, J.:—The codicil taken by itself gives Louis merely a life interest in the income with a power of appointment by will, in default of the exercise of which the testator would be intestate as to the disposition of the corpus after Louis' death.

While an unlimited gift of income carries to its donee the corpus as well, no authority can be found holding that a gift of income for life has this effect. Nor does the superadded power of appointment, which can never be exercised in his own favour, increase in any wise the interest of the donee of this power in the fund which is its subject.

Though the notice of motion only asks specifically for the construction of the codicil, yet in general terms it refers to both will and codicil. By clause (e) of his will the testator had devised the rest and residue of his property to Louis. The corpus of the \$10,000, of which the income by the codicil is given to Louis, would not under the scheme of the will as originally framed have been residuary estate. By a preceding clause (d), which the codicil revokes, Louis E. Hanmer was given the entire principal of his father's estate, except a sum set aside to produce an annuity for his mother; the testator by this codicil revokes the gift to his son of the principal of his estate; by the same instrument he expressly confirms *inter alia*

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the residuary bequest to him, which, the testator being otherwise intestate as to the corpus of the \$10,000 (except that he gives his son a power of appointment by will over it), therefore carries that corpus.

I cannot conceive that the testator so intended, yet he has in fact given the corpus of the fund to his son in default of his exercising the power of appointment.

The authorities seem uniform that such provisions constitute an absolute gift entitling the legatee to have the fund paid over.

The cases are collected in Theobald on Wills 5th ed., p. 429. Costs to both parties out of the fund.

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[DIVISIONAL COURT.]

DELAMATTER V. BROWN BROTHERS COMPANY.

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Landlord and Tenant—Lease—Short Forms Act—Covenant—Covenant to Repair—Variation from Statutory Form—R.S.O. 1887, ch. 106, Covenant 8.

March 13.

An indenture of lease, bearing date the 29th of June, 1891, expressed to be made in pursuance of the Act then in force respecting Short Forms of Leases (R.S.O. 1887, ch. 106) contained a covenant by the lessees that they would "leave the premises in good repair, *ordinary wear and tear only excepted*," the words in italics not being in the statutory short form and the extended statutory equivalent of the short form having in it the exception "reasonable wear and tear *and damage by fire only excepted*":—

Held, Magee, J., dissenting, that the added words were not an exception to or qualification of the short form within the meaning of the Act; that the covenant had to be construed as it stood without the aid of the extended form; and therefore that the exception as to damage by fire did not apply. Judgment of Boyd, C., affirmed.

APPEAL by the defendants from the judgment at the trial.

The action was brought by the respondents, who are husband and wife, against Brown Brothers Company and Brown Brothers Company Nurserymen Limited.

The male respondent, being the owner of a farm in the township of Pelham, by indenture of lease dated the 29th of June, 1891, and expressed to be made in pursuance of the Act respecting Short Forms of Leases (R.S.O. 1887, ch. 106), demised it to the appellants, the Brown Brothers Company, for the term of twelve years. to be computed from the 1st of April, 1892, and among the covenants on the part of the lessees contained in the lease were covenants in these words: "and to repair; and that the said lessor may enter and view state of repair; and that the said lessee will repair according to notice; and that they will leave the premises in good repair, ordinary wear and tear only excepted."

According to the allegations of the third paragraph of the statement of claim, which were admitted by the statement of defence, "subsequently to the making of the said lease, the plaintiff Ira Delamatter conveyed all the lands and premises in the said lease mentioned and contained to his co-plaintiff and wife, Emma C. Delamatter, and she is now and has been since the said conveyance the owner of the said lands and premises; and the defendants Brown Brothers Company also subsequently to

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the execution of the said lease conveyed all their interest in and to the said demised premises to their co-defendants Brown Brothers Company Nurserymen Limited, and the said Brown Brothers Company Nurserymen Limited accepted the said lease and all the covenants and conditions imposed in and by the same on the said defendants Brown Brothers Company, and became liable to the plaintiffs for all damages arising under and by reason of a breach of any of the covenants in the said lease contained."

In August, 1902, one of the buildings on the demised premises—a barn—was destroyed by fire, and it has never been rebuilt.

The action was brought to recover damages for breaches of the first and fourth of the covenants on the part of the lessees contained in the lease above mentioned, the breaches assigned being the failure of the appellants to rebuild the barn, besides other breaches to which it is unnecessary to refer, and to recover damages also for breaches of an agreement made by the Brown Brothers Company Nurserymen Limited on the 5th of April, 1904, to do certain ploughing and other work.

The action was tried at Welland on the 24th of November, 1904, before BOYD, C., who at the close of the case gave judgment in the plaintiffs' favour, holding that, according to the true construction of the covenant to repair, the defendants were not relieved from liability for damage by fire, directing a reference to the Master to determine the value of the barn, also directing a reference as to damages under the agreement of the 5th of April, 1904, and reserving further directions and costs.

The appeal was argued before a Divisional Court [MEREDITH, C.J.C.P., MACMAHON, and MAGEE, JJ.] on the 10th of January, 1905.

E. D. Armour, K.C., for the appellants. The action is wrongly framed. There has been misjoinder of plaintiffs and misjoinder of defendants. Assuming that there is any liability under the covenant to repair, the defendants Brown Brothers Company Nurserymen Limited are not liable. They are not privies in estate or covenant. At most they took possession under the lessees and cannot be made directly liable by the

lessors: *Walsh v. Lonsdale* (1882), 21 Ch.D. 9; *Cox v. Bishop* (1857), 8 D.M. & G. 815; *Friary's Breweries v. Singleton*, [1899] 1 Ch. 86, [1899] 2 Ch. 261; *Manchester Brewery Co. v. Coombs*, [1901] 2 Ch. 608, at p. 617. But there is in this case no liability on the part of either of the defendants as far as the damage to the barn is concerned. The excepting words added to the covenant do not prevent full effect being given to the statutory exemption as to fire. They are not repugnant or inconsistent. Keeping in mind the principle of construction laid down in such cases as *Bullen v. Denning* (1826), 5 B. & C. 842, namely, that covenants in a lease are to be construed in favour of the lessee and against the lessor it should be held that the lessees are entitled to the benefit of the long form, and are not liable for the damage in question. If this construction is not adopted, then the covenant becomes meaningless and is void, and in that view also the defendants escape liability. Even if there ever could have been a right of action on the covenant, that right has been lost, the defendants having accepted a surrender of the lease after the destruction of the barn.

W. M. German, K.C., for the respondents. There is nothing in the objection as to joinder of parties. The plaintiffs are jointly interested, and the defendants are liable either jointly or in the alternative. At any rate such an objection should, even if well founded, only be given effect to by motion in the initial stages of an action. There was no release or surrender, and nothing to affect the right of action: *Woodfall*, 17th ed., p. 362. It is, it is submitted, clear that there is a right of action under the covenants to repair and leave in repair. The words in question must have been added for some purpose, and it is evident on reading the short form and the long form that that purpose must have been to make the lessees liable in the event of damage by fire. At the least the covenant should be read in the form in which it appears in the lease, and without the benefit of the long form, and in that view the defendants are liable. Even if, however, the covenant to leave in repair be treated as void, the action lies under the covenant to repair, which is absolute in form.

Armour, in reply.

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March 13. MEREDITH, C.J. (after stating the facts as above set out):—The latter branch of the case as to the agreement of the 5th of April, 1904, it is unnecessary to refer to as the right of the respondents to the reference as to it which was directed by the learned Chancellor was not questioned on the argument before us.

The two main questions argued before us were: (1) whether under the covenants contained in the lease the lessees were bound to rebuild the barn which was destroyed by fire: and (2) whether there had been a surrender by the lessees to the landlord immediately after the fire occurred of the part of the farm upon which the barn had stood and the barnyard adjacent to it.

Upon the second question, the learned Chancellor came to the conclusion that what had taken place between the parties did not operate as a surrender, and I see no reason for differing from him.

In order that the acts of the parties may amount to a surrender by operation of law, it is necessary that there be an agreement by the landlord and the tenant that the term be put an end to, acted on by the tenant's quitting the premises and the landlord by some unequivocal act taking possession. There was as to all these matters conflicting evidence, and the trial Judge having, upon a consideration of the whole of it, reached the conclusion that the appellants had not proved the surrender set up by them, that conclusion ought not, in my opinion, to be disturbed.

The first question is one of very considerable difficulty, and I have come to the conclusion I have reached as to it with much hesitation and doubt.

The scheme of the Acts respecting Short Forms is to authorize the use of certain forms of words which are set forth in the Acts, and are the short forms, and to give to these forms of words when the instrument in which they appear is declared to be made in pursuance of the Act the same effect as if other forms of words which are set forth in the Act had been used.

The short forms are or are intended to be compendious expressions of what is contained in the corresponding long forms.

In order to provide for cases in which the long forms would not accurately express the terms which the parties to the instrument may desire to embody in it, they are, by the Act respecting Short Forms of Leases, permitted to substitute for the words "lessee" or "lessor" in the short form any name or names (or other designation); and they are also permitted to substitute the feminine gender for the masculine, and the plural for the singular number, and when these things are done corresponding substitutions are to be taken to be made in the corresponding long forms: Schedule B (1 and 2).

Schedule B also contains the following provisions:—"3. Such parties may introduce into or annex to any of the forms in the first column any express exceptions from or express qualifications thereof respectively, and the like exceptions or qualifications shall be taken to be made from or in the corresponding forms in the second column.

4. Where the premises demised are of freehold tenure, the covenants 1 to 8 shall be taken to be made with, and the proviso 9 to apply to, the heirs and assigns of the lessor; and where the premises demised are of leasehold tenure, the covenants and proviso shall be taken to be made with, and apply to, the lessor, his executors, administrators and assigns.

5. Unless the contrary is expressly stated in the lease, in all leases made after the 25th day of March, 1886, the extended form of covenant numbered 7 shall be read as containing after the word 'lessee' in the first line thereof the words 'his executors, administrators and assigns.'"

It seems clear from these provisions that it was intended that in order that the Act should operate upon the words used two things must concur: (1) that the lease should be declared to be made in pursuance of the Act, and (2) that the very words of the short forms should be used, except where deviations from them are authorized by the Act, and the provisions of the Act as to the deviations are complied with.

What then is the meaning and effect of sub-division 3 of Schedule B?

The "parties may introduce into or annex to any of the forms in the first column," *i.e.*, the short forms, "any express

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exceptions from (*sic*) or express qualifications thereof respectively."

What is an express exception from the short form, and what a qualification of it, and how is such an exception or qualification to be introduced into or annexed to the short form?

Applied to such a covenant as the one on which the question arises, which is numbered 8 in the form of covenants, and reads as follows, "8. And that he will leave the premises in good repair," what is such an exception or qualification?

The covenant in its extended form is to leave the premises "in good and substantial repair and condition," but this is subject to an exception which is thus expressed, "reasonable wear and tear and damage by fire only excepted."

Is the introduction into the short form of anything which extends the operation of the covenant by narrowing the extent of the exception to the generality of the obligation an exception or qualification of the form within the meaning of the Act?

I can understand that to add to the covenant to pay taxes (number 2) such words as "except the taxes for the current year," or to the covenant to repair (number 3) such words as "damage by fire or other casualty excepted," or to the covenant to keep up fences (number 4) the words "except line and road fences" would be to introduce into or annex to the respective covenants an express exception from or express qualification of them, for the addition of such words introduces an exception to the generality of the words of the short form as well as of the corresponding long form, and a qualification of that generality, but it is difficult for me to see how words annexed to the short form which are designed to increase the obligation of the covenantor can properly be said to introduce into the form an exception from it or to annex to the form a qualification of it.

What was done in the case of the lease in question shows how difficult, if not impossible, it is, if that is permitted, to make clear what is the meaning of a covenant such as number 8, "And that he will leave the premises in good repair," when words are added to it for the purpose of narrowing the exceptions which it contains, and therefore of enlarging or amplifying the covenant, and not of qualifying it.

If the words of the long form be written out and the words

added to the short form "ordinary wear and tear only excepted" be added to it, the covenant becomes, as it appears to me, almost if not altogether unintelligible, and I am unable to find in the Act any warrant for construing the long form as if all the exceptions to the generality of the covenant were eliminated and the added words were substituted for the words thus eliminated.

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Some light is, I think, afforded by the provisions of an Act *in pari materia* with the Act in question,—the Act respecting Short Forms of Conveyances. Clauses 1, 2 and 3 of Schedule B of that Act correspond with the similarly-numbered clauses of the Act in question, but there is another clause which is not found in the latter Act (clause 4).

Clause 4 reads as follows: "Such parties may add the name or other designation of any person or persons, or class or classes of persons, or any other words, at the end of form two of the first column, so as thereby to extend the words thereof to the acts of any additional person or persons, or class or classes of persons, or of all persons whomsoever; and in every such case the covenants 2, 3, and 4, or such of them as may be employed in such deed, shall be taken to extend to the acts of the person or persons, class or classes of persons, so named."

Form two referred to is "2. That he has the right to convey the said lands to the said (covenantee) notwithstanding any act of the said (covenantor)."

This provision strengthens the argument for holding that clause three was not intended to authorize the introduction or annexation of words designed to enlarge the operation of the covenant to which they are added.

I am led by these considerations to the conclusion that the words added to the short form in this case make the whole covenant one that did not "take effect by virtue of the Act," and that it is to be construed and "is as effectual to bind the parties thereto as if" the Act "had not been made" (sec. 2).

The result of this view as to the effect of the covenant is that the failure of the lessees to rebuild the barn which was destroyed by fire was a breach both of the covenant to repair and of the covenant to leave the premises in good repair, and

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that for that breach an action lies by the female respondent as assignee of the reversion against her lessees.

If the appellants the Brown Brothers Company Nurserymen Limited are not assignees of the term, they are not liable to the landlord for breaches of the lessees' covenants, although they have entered into possession and paid rent to the landlord: *Cox v. Bishop*, 8 D. M. & G. 815; *Friary's Breweries v. Singleton*, [1899] 1 Ch. 86, [1899] 2 Ch. 261.

It was contended by Mr. Armour that the evidence shewed that the appellants Brown Brothers Company Nurserymen Limited had never become assignees of the term, and upon its being pointed out that by their statement of defence, paragraph 1, they had admitted the allegations contained in paragraph 3 of the statement of claim that the term had been assigned to them and that they had become liable to the respondents for all damages arising from and by reason of any breach of any of the covenants mentioned in the lease, the learned counsel asked for leave to withdraw that admission; although counsel for the respondents said that it was immaterial to the respondents which of the appellants should be held to be liable for the damages to which the former might be found to be entitled, he did not assent to the leave to withdraw the admission being granted.

The question of amendment is important therefore only in considering a further objection urged by Mr. Armour to the constitution of the suit, his contention being that the respondents were not entitled to sue in the same action the appellants, the Brown Brothers Company for breaches of the covenants in the lease and the other appellants for breaches of the agreement of the 6th of April, 1904. The objection thus viewed is one of form only, and the amendment asked for should not be allowed except upon terms which will prevent both appellants from raising this formal objection.

That such a condition may be imposed is clear, I think: *Hollis v. Burton*, [1892] 3 Ch. 226; and that this is a proper case in which to impose it I have no doubt.

As far as the joining of the respondents as co-plaintiffs is concerned, which was also objected to, that was not improper: Con. Rule 234.

The result is that, in my opinion, the appellants the Brown

Brothers Company Nurserymen Limited should be allowed to withdraw the admission which they seek to withdraw if both appellants agree to waive all objection to the manner in which the action is constituted, and if that is done the action, as far as it relates to the breaches of the covenants in the lease, should be dismissed as against the appellants the Brown Brothers Company Nurserymen Limited without costs, and that the judgment on this branch of the case should be entered against the other appellants, with a reference as to damages as directed by the learned Chancellor, with this variation that as to all of the breaches assigned of the covenants in the lease save only the breach assigned in respect of the barn, the action should be dismissed. The judgment on the other branch of the case should be against the appellants the Brown Brothers Company Nurserymen Limited only, and as to this branch the action should, as against the other appellants, be dismissed without costs.

In other respects the judgment appealed from should be affirmed, and there should be no costs of the appeal to either party.

If, however, the appellants do not take advantage of the leave to amend, the action will be dismissed as against the appellants the Brown Brothers Company Nurserymen, Limited, without costs and without prejudice to any other action which the respondents or either of them may be advised to bring against them in respect of the barn, and the judgment will stand as against the other appellants with the same variation already mentioned, of dismissing the action as to all of the breaches of the covenants in the lease except the breach as to the barn, and the same disposition will be made of the costs of the appeal.

MACMAHON, J.: I agree.

MAGEE, J.:—The plaintiffs are husband and wife. The defendants are two companies, incorporated one in the United States and the other in Canada. It is said that both companies have practically the same membership.

The action is on covenants in a lease from Mr. Delamatter to the American company of lands in Ontario, and on an agreement made by the Canadian company with Mrs. Delamatter

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after the termination of the lease with reference to ploughing and other work to be done by the company on the demised premises.

During the term the lessor conveyed the reversion in fee to his wife, and the plaintiffs allege that the lessee company also assigned the term to the Canadian company.

The lease is dated 29th June, 1891, for a term of 12 years from 1st April, 1892, at a rental of \$800 per year. It is under seal, and was made on a printed form and expressed to be made in pursuance of the Act respecting Short Forms of Leases. It had printed in it covenants in the Short Forms 1, 3, 6, and 8, in column one of Schedule B, to that Act (then R.S.O. 1887, c. 106). In this lease, after the printed form 8, "And that they will leave the premises in good repair," the parties have added in writing these words, "ordinary wear and tear only excepted." If these words were added to the extended form 8 in column 2, which the statute makes the short form the equivalent of, the lessees' covenant would stand thus, "And further, the lessees will, at the expiration . . . of the said term . . . peaceably surrender and yield up . . . the said premises hereby demised . . . together with all buildings . . . in good and substantial repair and condition, reasonable wear and tear and damage by fire only excepted—*ordinary wear and tear only excepted.*" The last six words being those added in this lease, and not found in the Act itself.

During the term, but after the deed from the plaintiff husband to his wife, a valuable barn on the demised premises was destroyed by fire, and the plaintiffs seek under the covenant to hold one or other of the defendant companies liable to the extent of its value for damages for not rebuilding it, and so not yielding up the premises in good repair. The plaintiffs claim that, as the statutory printed form unaltered would have excepted reasonable wear and tear and damage by fire from the lessees' liability, and as by the added words it is provided that ordinary wear and tear only is excepted, therefore damage by fire is not excepted. On the other hand it is claimed for the defendants that the added words still leave damage by fire excepted, or else, say they, the covenant is left so contradictory and repugnant that no meaning can be given it and it is void.

To this the plaintiffs retort that in no case is the covenant void, but at the worst the statutory form is so altered, that it, in the words of sec. 2 of the Act, "fails to take effect by virtue of this Act," and therefore loses the interpreting benefit of the statute, and is to be read as the words stand and with their ordinary and natural meaning—or even if the covenant be void or ineffectual the lessees' other covenant in form 3, "and to repair," renders the defendants liable, as it is absolute, with no exception as to fire.

It is perhaps necessary first to dispose of the question whether the altered covenant loses the benefit of the statutory interpretation.

In endeavouring to construe the lease we are not at liberty to make any assumptions as to the intention of the parties beyond what we find in the document itself. They may or may not have known that there was such an Act as that respecting the short forms of leases, or that this short form 8 really did not mean what on its face it purported to mean, or that under form 3, if it stood alone, the lessees would be liable to repair damage by fire. It may be that it never occurred to the lessees' officers that a tenant might be rendering himself liable to the risk of having to replace buildings destroyed by fire. That such a risk is not usually undertaken by tenants deliberately has since this lease been recognized by the Legislature in amendments to these very forms. Here the parties must be taken to have known what they were doing. They expressly say the lease is made pursuant to the Act, and they use a printed blank form embodying the covenants set forth in the Act, and no case is made of mistake or for reformation. But this at least should be borne in mind, that a construction should not be lightly adopted which would place an unusual burden upon a tenant, especially when there is a total absence of such provision for insurance as we would expect to find if these parties deliberately intended that the ordinary course in this country of the owner taking the risk of fire should be departed from.

Under this lease as it was printed, the lessees would not have been liable to repair damage by fire. It is true that in the lessees' covenants, forms 3 and 6, "to repair," and "to repair according to notice," fire is not excepted; but as it is

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excepted by form 8, it was held in *Emmett v. Quinn* (1882), 7 A.R. 306, that the three must be construed together, and the exception in form 8 governed all. Have then these parties, by the added words, shewn an intention to take away this exemption and transfer the risk from the landlord to the tenant? If this altered covenant can be said to fail to take effect by virtue of the Act, and the words have to be read in their natural and ordinary meaning, then they have done so. But does it so fail?

These short forms were adopted only for convenience, and as the two first Acts had it, "to facilitate" the conveyance and leasing of realty. They were not invested with any sanctity. They were not intended, like the statutory conditions of fire insurance, to be an expression of what the Legislature considered as reasonable. They were for the convenience not the restriction of parties in making their contracts. They could be used or not as the parties chose. They were, as Mr. Justice Street puts it in *Clark v. Harvey* (1888), 16 O.R. 159, symbols. Consistently with the clear maintenance of the symbolic character there is in principle and in the intent of the Legislature no reason why the liability of a covenantor should not, if the parties so desire, be extended beyond that created by the form or restricted or modified.

Here the parties have retained the symbol complete and exact, and the fact of its being printed at least does not lessen its value as such. What they have done is to add an exception of some sort. Now, even if the statute had not expressly permitted the introduction or annexing of other words, it does not seem to me that there was anything to prevent the extension or modification of any of the stipulations of these forms by the addition of apt words, but it would have had to be kept quite clear that the symbolism was not abandoned, and that the parties had in view the object of the statute, merely to substitute a short phrase for a long one. The statute, apparently contemplating that such uses would be made of the forms, expressly allows certain modifications. It is not necessary here to consider whether those which it mentions are exclusive. All three of these Short Forms Acts respecting conveyances, leases, and mortgages allow (and in the same defective wording) the

introduction or annexing of "express exceptions from or express qualification thereof." I was at first inclined to the view that this meant in the case of covenants an exception from or qualification of the liability thereby created; or, in other words, that the liability could be lessened but not increased. Such an effect might also be argued for as regards the forms operating as releases, but it could hardly be so readily applied to other provisions and stipulations for which the short phrases are provided (see *Crozier v. Tabb* (1876), 38 U.C.R. 54). But on consideration, even as regards the covenants, I do not think the meaning can be so restricted. As I have said, there is nothing in the intention of the Legislature to prevent the parties extending their liability as they please. The Act does not say that it is to be an exception from or qualification of the liability, but apparently any exception from or qualification of the form. The only requirement it makes is that it shall be introduced into or annexed to the form, and it must be express. In other words, the change cannot be made by omission: *Brown v. O'Dwyer* (1874), 35 U.C.R. 354; *McKay v. McKay* (1880), 31 C.P. 1. In one instance, indeed, by recent amendment, a change by omission is allowed in certain leases in the present form 2 by leaving out the last four words in the covenant "to pay taxes except for local improvements:" 1 Edw. VII., ch. 12, sec. 27 (O.)

The short form clauses 3, 6, and 8, which are found in the lease in question, have since its date been amended, and now have appended to each of them the words "reasonable wear and tear and damage by fire, lightning, and tempest only excepted"—thereby expressly relieving the covenanting lessee from liability for such damage. Now, suppose the parties chose to agree that the tenant should bear the loss if the damage by fire did not exceed \$10, or if it arose from the smoking of tobacco; or, suppose, in the case of taxes for local improvements they agree that the tenant should not be relieved from paying sewer tax or pavement tax, must it be assumed that the Legislature intended to prevent making such provision by a modification of the short form? Say in the last case the words were added to form 2 so that the covenant would read "to pay taxes except for local improvements other than sewer tax," or that words were added to form 8 so that it would read, "And to leave the premises in

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good repair, reasonable wear and tear not exceeding \$100, and damage by fire, lightning, and tempest only excepted," would not the changes made be express exceptions from or qualification of the forms? I cannot bring myself to think that they would not, or that the Legislature intended forms given for public convenience to have so little elasticity. If such changes would be allowable then the Act permits the liability of the covenantor to be increased, and the argument that the added words in the lease in question form an exception to an exception, and therefore are not permitted by the Act, cannot prevail.

Then, if we amplify the covenant in question by the statute, what is the effect? I have above given the enlarged reading. It is to be noticed that the long form 8 in the statute excepts wear and tear and damage from certain causes. The word "damage" is not expressly applied to wear and tear; also that the wear and tear excepted is "reasonable wear and tear." Then the parties add words excepting "ordinary wear and tear." The defendant companies are tree-nurserymen, and used the farm as a tree-nursery. Such a use appears from the lease to have been contemplated. What might be reasonable wear and tear by these lessees might not be ordinary wear and tear. The parties must be taken to have chosen their language, and a lessor might well say, "I do not know what you may call reasonable wear and tear in your business. I only want to relieve you from ordinary wear and tear." Then is not the effect of the added written words merely to qualify the allowance which is to be made for wear and tear? Is it not wear and tear only which the parties are dealing with? And when they qualify it, and full effect can be given to the words by so doing, is it reasonable to extend them beyond that cause of deterioration, and make them cover also that which is treated separately as damage, and thereby, without further evidence of any intention so to do, cast upon the tenants a very serious loss, from which, if these words were not inserted, they would have been free, and to the risk of which it is very unusual for tenants to be asked to submit?

Let us test the meaning in another case. Suppose the added words were "damage by purely accidental fire only excepted." I am assuming all the time, as we are bound to do,

that these parties both knew the wording and meaning of the long form relieving the tenant from liability for fire and wear and tear. Would it be a reasonable construction that this limitation of the exemption as to fire would necessarily leave the tenant to pay for reasonable wear and tear for which he would not have been liable?

Or suppose, in a lease with the present statutory form 8, which excepts reasonable wear and tear, and damage by fire, lightning and tempest, the parties added, "damage by lightning causing fire only excepted," or "damage by tempest other than hailstorms only excepted," would it be reasonable to construe this as dealing not only with lightning or tempest, but also with fire and wear and tear?

The situation is not the same as if the added words were "reasonable wear and tear only excepted." The parties have chosen their words. The plaintiffs are standing upon strict legal rights, and seeking to throw an unusual burden upon their tenant, and cannot complain if held to the words which the parties used. I think the proper construction leaves unaffected the exception of damage by fire from the lessees' covenant to leave in good repair.

If that be correct, then, on the authority of *Emmett v. Quinn*, 7 A.R. 306, the lessees would be relieved also from damage by fire under their absolute covenant (form 3) "to repair." No claim is made under the other covenant (form 6) "to repair according to notice," which means notice in writing; but that covenant also would be modified by the exception in form 8.

In this view it is unnecessary to discuss whether or not Mrs. Delamatter accepted a surrender of the barnyard, including the site of the destroyed barn, within a few days, or at any time, after the fire, or thereby deprived herself of any remedy which she might have had under either covenant for the value of the building.

I must say that it is with very great hesitation that I have felt compelled to differ from the judgment appealed from, as well as from the judgment of this Court on the question I have dealt with.

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As it is conceded that the defendants proved a release from the plaintiffs as to all other claims except those arising against the defendants the Canadian company subsequently thereto upon their agreement with Mrs. Delamatter, and these latter claims have, by the judgment appealed from, been referred to the Master, and, as it is alleged that these claims are trifling, the judgment appealed from should, in my opinion, be varied by declaring the release and dismissing the action as against the defendants, the American company, with costs to be paid by the plaintiffs, and as against the defendants the Canadian company in respect of all claims except those so referred, and reserving the costs of the plaintiffs and the latter defendants in the action generally, and of the reference, till after the Master's report, unless counsel could agree upon the amount of the damages, in which case the costs could be disposed of here.

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[IN THE COURT OF APPEAL.]

IN RE CANADA WOOLLEN MILLS, LIMITED.

(LONG'S APPEAL.)

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March 17.

Company—Winding Up—Inspector—Purchase of Assets—Liquidator—Sale of Assets—Approval of Court.

An inspector appointed in liquidation proceedings under the Dominion Winding up Act, R.S.C. 1886, ch. 129, is in a fiduciary position as regards the disposal of the assets and cannot, without the consent of all persons interested, become the purchaser thereof.

In such liquidation proceedings the power to sell the assets is by the Act vested in the liquidator, not in the Court, though the liquidator must obtain the approval of the Court as a condition of exercising the power of sale.

AN appeal by W. D. Long from the judgment of MacMahon, J., reported 8 O.L.R. 581, was argued before Moss, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A., on the 23rd and 24th of January, 1905.

I. F. Hellmuth, K.C., and *P. D. Crerar*, K.C., for the appellant.

W. H. Blake, K.C., for the respondents.

H. Cassels, K.C., for the liquidator.

The facts, as far as it is necessary to state them for a proper understanding of the legal points involved, are set out in the report below and in the judgments in this Court, and the cases relied on are there referred to.

March 17. Moss, C.J.O.:—[The learned Chief Justice stated the facts relating to Long's application, and gave a synopsis of the correspondence between his solicitors and those of the liquidator in reference to the formal agreement for sale, and then continued]:

On the 6th of May, 1904, the Referee acting under the authority given to the Court by the Act 62 & 63 Vict. ch. 42, sec. 1 (D.) appointed Mr. Long one of the inspectors of the estate. An inspector's duty as declared by the Act is to assist and advise the liquidator in the liquidation of the Company. And provision is made (sec. 2) for remunerating him for his services.

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It cannot be denied that a person who has been appointed to the position of inspector is disqualified so long as he holds the office from becoming the purchaser of the assets. His duty being to assist and advise the liquidator in the liquidation, and one important—if not the most important—act in the liquidation being the disposition of the assets, an inspector is bound to see that the very best sale is made and the very best price obtained. He is in the position of a trustee for sale and he is unable to discharge himself from that position without the consent of his *cestuis que trust*, or at all events without an order of the Court after notice to all concerned. See *Ex parte Perkes* (1843), 3 M. D. & DeG. 385.

Down to the moment of his discharge he owes to the creditors and the liquidator all the knowledge he possesses and all the assistance and advice his knowledge and information concerning the assets and the manner of their disposition places within his power to give: and as was determined in *Ex parte Lacey* (1802), 6 Ves. 625, and *Ex parte James* (1803), 8 Ves. 337, it is not sufficient for the trustee to divest himself of the character of trustee, he must shake off the character altogether. He will not be allowed to purchase if he continue to act as trustee up to the point of the sale, getting during that period all the information that may be useful to him, then discharging himself from the character and buying the property: 2 W. & T.L.C. 7th ed., p. 729, and cases.

It is argued that Long had been in effect discharged from his office of inspector before the making and acceptance of his offer. But it is plain that this was not the case. There was no suggestion on the 22nd of September when he first intimated his intention of making an offer that he be then discharged. But even if the suggestion had been made it could not have been given effect to without notice to all the parties interested. Then during the time which elapsed between that date and the date of his offer he remained in his office of inspector; and of all the information which he obtained while he was engaged in seeing what he could do he was bound to make full disclosure and to give the benefit of to the liquidator and the creditors. Then and only then would he have been entitled to be discharged and placed in a position to make an

offer. As it was his offer was burdened with the condition that it must be dealt with at once and without giving others an opportunity of making higher offers.

There was by no means a consensus of opinion that it was for the benefit of the estate that the offer should be accepted. And there is no pretence that any order discharging him from his office of inspector was agreed to. The purchase being thus made by him while he still occupied a fiduciary position towards the estate was one which he was not competent to make and which was open to be set aside at the instance of the liquidator or any creditor interested in the estate: *Morrison v. Watts* (1892), 19 A.R. 622; *Segsworth v. Anderson* (1893), 23 O.R. 573, (1894), 21 A.R. 242, (1895), 24 S.C.R. 699; *Gastonguay v. Savoie* (1899), 29 S.C.R. 613. The principle enforced by these and other cases that one occupying a fiduciary position shall not while the relation continues be entitled to deal for his own benefit has long been recognized as a well founded and salutary rule resting on solid reasons, and it is not desirable that it should be weakened.

It is not necessary to impugn Long's good faith. It may be taken for granted that he acted in good faith and without any improper motive or any intention to obtain an undue advantage. But his position disqualified him from dealing as he attempted to do with the assets of the estate, and on this ground alone the transaction ought not to be permitted to stand as a purchase by him.

But assuming that the position of purchaser was open to him there is still the difficulty that there was no sale by which the liquidator was bound. The language of secs. 31 and 33 of R.S.C. 1886, ch. 129, and the decisions upon the section of the Imperial Act corresponding to sec. 33, shew that the sale must be the result of the action of the liquidator approved of by the Court. And in order to enforce a sale to him a purchaser must have an agreement with the liquidator approved by the Court. Such a sale cannot be likened to a sale by the Court, acting under its ordinary jurisdiction as in mortgage or partition actions, where the proceedings are by the direction of the Court and the matter is within its sole control. In this case the liquidator made no agreement. The steps which were

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being taken to that end and which if completed would have bound him to the terms of an agreement were intercepted by the proceedings to question what had been done. The matter remained *in fieri* so far as he was concerned. It never reached the point of a sale by the liquidator within the terms of sec. 31 of the Winding-up Act.

The result is that the appeal fails and must be dismissed.

OSLER, J.A.:—I am of opinion that the appeal should be dismissed.

1st. There was no contract binding upon the liquidator. It seems to have been assumed that the Referee—the Court—had the authority to sell. What the statute provides is (R.S.C. 1886, ch. 129, sec. 31): “The liquidator may, with the approval of the Court, and upon such previous notice to the creditors, etc., as the Court orders, . . . (c) sell the real and personal property of the company, by public auction or private contract, and transfer the whole thereof to any person or company, or sell the same in parcels.”

The power to sell is conferred upon the liquidator not upon the Court, though he must obtain the sanction or approval of the Court before he exercises it.

Section 33 provides in the same way, that the liquidator may with the approval of the Court compromise debts, claims, and calls, and in *In re East of England Banking Company, Pearson's Case* (1872), L.R. 7 Ch. 309, it is laid down that the action must be that of the liquidator. The power of the Court is to grant or withhold its sanction, not to do the thing power to do which is *sub modo* conferred upon the liquidator alone; and see S.C. 41 L.J. Ch. 524. The same reasons which influenced the decision upon the compromise section apply to sec. 31 and make it clear that the initiative is not with the Court, which has merely a controlling power over the action of the liquidator. The sale is to be by him not by the Court, and therefore the ordinary requisite of a valid contract *inter partes* must exist before its performance can be enforced against him. These it is manifest do not exist in the present case, there being nothing in writing signed by the liquidator or any agent of his authorized to make the agreement relied on.

2nd. The appellant was not a person to whom the estate could under the circumstances properly be sold. He was still one of the inspectors of the estate and occupied as such a fiduciary position which disqualified him from being a purchaser. It is said that he and the liquidator and his fellow inspectors were practically, whatever that may mean, at arms' length. But he was in fact still inspector, possessed as such of peculiarly favourable means of knowing the value of the property he proposed to buy. He was in that respect in a more favourable situation than others who might propose themselves as purchasers and this is brought out in the evidence in a very pointed manner. After the abortive attempt to sell by auction on the 15th of September and at a discussion which followed upon it the appellant announced that he would make an offer for the whole of the assets in about a week *after he had seen what he could do*. He made it a condition that his offer should then be dealt with at once, "as he did not propose to be used as a lever to get some one else to go up a little higher."

But things being as they were his duty was to see that the very best price possible should be obtained and not to stipulate that after he had discovered that he could make an advantageous bargain for himself no use should be made of his knowledge by the estate in order to obtain a better. The cases of *Morrison v. Watts*, 19 A.R. 622; *Segsworth v. Anderson*, 21 A.R. 242, 24 S.C.R. 699; and *Gastonguay v. Savoie*, 29 S.C.R. 613, may be referred to.

I think the Referee should have allowed the application and have placed the liquidator in a position to entertain further offers unembarrassed by the supposed acceptance of that of the appellant.

MACLENNAN, GARROW, and MACLAREN, J.J.A., concurred.

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[IN CHAMBERS.]

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Feb. 10.

DUNLOP V. DUNLOP.

Evidence—Ex parte Motion—Examination of Witness—Con. Rule 491.

Con. Rule 491 applies to an *ex parte* motion and therefore a witness may be examined in support of such a motion.

MOTION to set aside a subpoena and appointment for examination of the applicant, argued before the Master in Chambers, on the 9th of February, 1905.

The plaintiff had obtained an *ex parte* order for substitutional service of the writ of summons on the person now sought to be examined. The papers had been served but had been returned by her solicitors, who wrote that the witness "cannot and will not communicate the fact of service to the defendant." Thereupon the plaintiff's solicitor thought it prudent to take some other course. He therefore moved again for an order for substitutional service, filing an affidavit stating the abortive result of his first order and that the witness "is in communication with the defendant and knows of his whereabouts and address," and took an appointment for the applicant's examination as a witness in support of the motion, and this application was thereupon made.

There were several grounds taken in the notice of motion. Those mainly relied on were: (1) That there was no motion pending before the Court and so Rule 491 did not apply; (2) that an order for substitutional service had already been made and acted on, and that the witness, on whom the writ had been directed to be served, had disclaimed any knowledge of the defendant's residence; and (3) that the Rules did not provide for or permit the examination of witnesses upon an *ex parte* motion.

W. E. Middleton, for the applicant.

W. J. Elliott, for the plaintiff.

February 10. THE MASTER IN CHAMBERS (after stating the facts as above set out):—It was argued that the witness had no

status to move yet. This point was met by the case of *Steele v. Savory* (1891), 8 Times L.R. 94, which seems to overrule the objection.

The substantial question is whether an *ex parte* motion is a "motion before the Court" within the meaning of Rule 491.

The notes to this Rule in Holmsted & Langton, at p. 673, and the cases cited seem to shew that an *ex parte* motion is a motion in support of which evidence can be obtained thereunder. In the present case the plaintiff is right in trying to obtain such information as will enable such an order to be made as will *prima facie* bind the defendant on the question of service. When an order has been made, as here, which is plainly abortive, it does not seem reasonable to hold in the absence of authority that the plaintiff's whole remedy is exhausted. In that case the action would virtually be at an end. Perhaps an order could not even be obtained for the renewal of the writ, as it might be held that it had been served, though ineffectually. If the witness submits to examination and denies knowing the residence of the defendant or having any letters from him since his departure from Toronto or since the issue of the writ herein that would end the matter. If the witness is able to give any information that may be useful to the plaintiff there seems no principle on which that assistance should be withheld. Many persons are obliged to give evidence in legal proceedings, in which they are not directly concerned, at much loss and annoyance to themselves.

It is to be supposed the case will go higher as the point is new. In my opinion the motion should be dismissed, and the examination should be had as soon as the time for appealing from this order has elapsed. I do not think it is a case for costs.

On the 17th of February, 1905, an appeal against this order was argued by the same counsel before MEREDITH, J., who at the close of the argument dismissed the appeal without costs.

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[DIVISIONAL COURT.]

REX V. PIERCE.

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Nov. 11.

Conviction — Penalty — Canvassing for Contracts — Unregistered Company — R.S.O. 1897, ch. 205, sec. 2, sub-sec. 5; sec. 117—63 Vict. ch. 27, sec. 12 (O.) — 4 Edw. VII. ch. 17, sec. 4 (O.)—Intra Vires Provincial Legislature.

On an appeal from a conviction by a police magistrate for an offence under R.S.O. 1897, ch. 205, sec. 117, The Loan Corporations Act, as amended by 63 Vict. ch. 27, sec. 12 (O.) and 4 Edw. VII. ch. 17, sec. 4 (O.), set out in the judgment:—

Held, that the contracts referred to in clause (b) of 4 Edw. VII. ch. 17 sec. 4 is not restricted to such contracts as are mentioned in sub-sec. 5 of sec. 2 of R.S.O. 1897, ch. 205, and

Held, also, that as the effect of clause (b) is to prohibit the making of such contracts as are dealt with by that clause under the penalty therein mentioned, the enactment is *intra vires* the Provincial Legislature.

The appellants were convicted by the police magistrate of the city of Toronto on the 14th of June, 1904, of the offence of having, acting as agents for the Preferred Mercantile Company of Boston, incorporated, entered into a contract contrary to the enactments contained in sec. 117 of ch. 205 of the Revised Statutes of Ontario, 1897, and the amendments thereto, and from that conviction this appeal was brought under the provisions of sub-sec. 4 of sec. 117.

The appellants were convicted of a contravention of sec. 4 of ch. 17, 4 Edw. VII. (O.), an Act amending R.S.O. ch. 205. That not being registered under the Loan Corporations Act, R.S.O. ch. 205, they entered into a contract, the benefit of which to the contract holder was to be postponed or deferred until other contract holders had been provided for, or which was to depend upon the number or persistence of the other contract holders or upon the order or sequence of the contract.

The evidence shewed that the defendants were canvassing for customers to enter into leases with the Preferred Mercantile Company, incorporated under the Laws of Massachusetts, issued in series, called diamond leases—providing for payment by the customer of \$110.00 in weekly payments, with fines for default; and forfeiture of rights after 5 weeks' default—power to the company to redeem the leases; and make payment, after instalments paid in full, in diamonds at \$100.00 per carat in a certain order, if there were sufficient funds to the credit of the lease.

The appeal was argued on the 27th of September, 1904, before a Divisional Court composed of MEREDITH, C.J.C.P., MACLAREN, J.A., and MACMAHON, J.

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E. F. B. Johnston, K.C., and *Godfrey* for the appeal. If ch. 205 R.S.O. 1897, and the amending Act, ch. 17 of 4 Edw. VII (O.), apply to the defendants, and if the provisions of said ch. 17 are not *ultra vires* of the Provincial Legislature by reason of the fact that they create a crime, it is admitted the conviction should stand. But those Acts only apply to loan corporations who are entitled to be registered. The defendants *could not* be registered to do business under them, consequently they do not apply to this case, and the conviction should be set aside. Sec 4. of ch. 17 of 4 Edw. VII (O.) also creates a crime, and is *ultra vires* of the powers of the Province, and the conviction is bad for that reason.

John R. Cartwright, K.C., Deputy Attorney-General, and *Curry* K.C., *contra*. The contracts made by the defendants are a clear contravention of section 4 of ch. 17 of 4 Edw. VII (O). The words of sub-sec. (b) are wide enough to cover such contracts, and that section is not restricted to such as are mentioned in sub-sec. 5 of sec. 2. The meaning of the words is that such companies are prohibited from doing such business unless they are registered.

Johnston, in reply.

November 11th. MEREDITH, C. J.:—Two points only were taken against the conviction on the argument before us, (1) That clause (b) of sub-sec. 2 of sec. 117, as amended, is not of general application, but applies only to such contracts as are mentioned in clause 5 of sec. 2 of ch. 205; (2) That if of general application clause (b) deals with criminal law, and is therefore *ultra vires* the Provincial Legislature.

I am of opinion that neither of these objections is well taken.

The language of clause (b) standing by itself is plain, and the contract which the appellants entered into, if the clause is to be read literally, was entered into in contravention of its provisions. This was conceded by counsel for the appellants;

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but it was argued that, having regard to the fact that it forms part of a statute dealing with loan corporations, and, reading it in connection with and in the light of the other provisions of the statute, the expressions "contract, agreement, undertaking, or promise," must be taken to mean such a contract, agreement, undertaking or promise as is mentioned in clause 5 of sec. 2.

I see no reason for so limiting the operation of the clause.

The original Act, R.S.O. 1897, ch. 205, provided for the incorporation and registration of loan corporations, and its prohibitory provision, which was contained in sec. 117, as far as it is material to the present enquiry to state it, was against any incorporated body or persons acting in its behalf other than a corporation "standing registered under this Act" undertaking or transacting the business of a loan corporation in the Province as that business is described in clause 5 of sec. 2.

The Revised Statute was amended by 63 Vic., ch. 27 (O), and by the 12th sec. of the amending Act a second sub-sec. was added to sec. 117, which prohibited any person, partnership, organisation, society, association, company, or corporation, not being a corporation registered under the Act or under the Ontario Insurance Act, from assuming or using in this province a name which includes any of the words "Loan," "Mortgage," "Trust," "Trusts," "Investment," or "Guarantee" in combination or connection with any of the words "Corporation," "Company," "Association," or "Society," or in combination or connection with any similar collective terms.

Then came the amendments of 1904 (4 Edw. VII., ch. 17, sec. 4 (O)), upon which the question which we have to determine arises.

Clause (b) reads as follows :—

(b) In this clause lettered (b) :—

"Consideration" means any consideration which includes an entrance or membership fee, or expense contribution, initial, renewal, periodical, or recurrent, or which includes any periodical or recurrent contribution to a fund, or account, or source for, or intended or alleged to be for, the carrying out of any such contract as in this clause defined ;

"Contract," means and includes any contract, agreement, undertaking, or promise upon such consideration ;

(i) To pay to or for the contract holder any money or money's worth;

(ii) To sell, supply, or procure any building or site or land, or to bring about the purchase and sale or supply thereof: or

(iii) To construct or procure the construction of any house or building.

And "contract" further includes any contract, agreement, undertaking, or promise, the benefit of which to the contract holder paying such consideration is to be wholly or partly postponed or deferred until other contract holders have been provided for, or is to depend upon the number or persistence of the other contract holders or upon the accession of new contract holders or upon the order or sequence of the contract.

Any person, partnership, organisation, society, association, company or corporation, not being a corporation registered under this Act or under the Ontario Insurance Act, that undertakes or effects, or offers to undertake or effect any such contract, shall be guilty of an offence against sub-sec. 1 of this section; and any person acting in behalf of such person, partnership, organisation, society, association, company, or corporation, shall be guilty of an offence against sub-sec. 2 of this section, and upon conviction thereof shall be liable to the same penalty as in the said sub-sec. 2 enacted; . . . "

Clause (b), but for the exception from the operation of it of corporations registered under the Act or under the Ontario Insurance Act would have applied to these corporations, and there is nothing in the nature of the exception which makes it necessary to confine the application of the clause to such of the contracts with which it deals as a registered loan corporation or a corporation registered under the Ontario Insurance Act may lawfully enter into. Some, at all events, of the contracts with which clause (b) deals, these corporations may lawfully enter into, and the Legislature may well have intended absolutely to prohibit the entering into of such contracts by any one except a corporation registered under the Act or under the Ontario Insurance Act, leaving the last-named corporations free to enter into such of them as they were respectively empowered to enter into by the Acts relating to such corporations.

It was urged that it was unlikely that the Legislature, in

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dealing with the subject of loan corporations, intended to alter the general law so as to make unlawful contracts not within the scope of the business of such corporations by whomsoever entered into or undertaken, but the exception in favor of companies registered under the Ontario Insurance Act shews, I think, that it was not intended to deal merely with such contracts as come within the provisions of clause 5 of sec. 2 of ch. 205, and the provisions of clause (c) make it quite clear, that the Legislature had in view changes in the general law and not merely provisions affecting the business of loan corporations; that clause deals with the cost of loans, and in terms applies to "any person, partnership, organisation, society, association, company, or corporation whatsoever, that advances or lends money," and extends to all loans of money not exceeding \$200, and not merely to such loans to that amount as a loan corporation is authorised to make.

The form which the prohibition takes is not well chosen. The undertaking, or effecting or offering to undertake, or effect any of the contracts mentioned in clause (b) by any person, partnership, society, association, company, or corporation, not being a corporation registered under the Act or under the Ontario Insurance Act, is made an offence against sub-sec. 1 of sec. 117, and any person acting in behalf of such person, partnership, society, association, company, or corporation is declared to be guilty of an offence against sub-sec. 2 of the same section.

Sub-section 1 of sec. 117 prohibits the undertaking of the business of a loan corporation as described in clause 5 of sec. 2, and contains a declaration as to what shall be deemed "undertaking the business of a loan corporation" within the meaning of the section, and sub-sec. 2 provides that if any promoter, organiser, office-bearer, manager, director, officer, collector, agent, employee, or person whatsoever undertakes or transacts the business of a loan corporation which does not "stand registered under this Act," he shall be guilty of an offence.

While the form of this legislation lends colour to the argument of the appellants' counsel, that what is struck at is the making of such of the contracts mentioned in clause (b) as form part of the business of a loan corporation as described in clause 5 of sec. 2, it is not enough to warrant us in cutting down what is, I

think, the otherwise plain and unambiguous language of clause (b), and I prefer to adopt the view that what the Legislature has said in this respect is but a clumsy way of saying that the penalty for doing any of the acts mentioned in clause (b) shall be the same as that provided by the sections to which reference is made.

There remains to be considered the question as to the constitutionality of the enactment.

It was contended by counsel for the appellants, that the legislation is, in form as well as in substance, criminal law, but it was conceded that, if the effect of clause (b) is to prohibit the making of such contracts as it deals with under the penalty which it imposes, the enactment is *intra vires* the Provincial Legislature.

That such is the effect of the enactment is not, I think, open to doubt.

It was said by Lord Hatherley in *In re Cork and Youghal R.W. Co.* (1869), 4 Ch. App. 748, at p. 758, that "everything in respect of which a penalty is imposed by statute, must be taken to be a thing forbidden, and absolutely void to all intents and purposes whatsoever;" and that, he states, to be the view taken by the learned judges in *Chambers v. The Manchester and Milford R.W. Co.* (1864), 5 B. & S., 588. That a penalty implies a prohibition is stated in *Pangborn v. Westlake*, (1873) 36 Iowa, 546, at p. 549 to be the general rule, and that was also the view taken by the Supreme Court of the United States in *Miller v. Ammon*, [1891] 145 U.S., 421 at p. 426.

If it be necessary to the validity of the enactment that it be construed as prohibiting that, for the doing of which a penalty is imposed, that construction, upon well-understood principles, should be given to it if the language used at all warrants that being done.

In my opinion the appeal fails, and should be dismissed, with costs:

MACLAREN, J.A., and MACMAHON, J., concurred.

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[IN CHAMBERS.]

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LEACH V. BRUCE.

Nov. 30.

*Venue—Where Cause of Action Arose and Parties Resided—Change To—
Affidavits Should be by Parties and Not by Their Solicitor.*

Con. Rule 529 (b) applies to county court cases, and under such Rule the venue was changed and the action transferred to the court of the county where the cause of action arose and the parties resided.

Corneil v. Irwin (1903) 2 O.W.R. followed.

The affidavits in such a motion should be made by the party himself and not by his solicitor. In any event an affidavit by the solicitor merely stating that the action could be more conveniently tried in a named county was too vague.

Hood v. Conkrite (1868) 4 P.R. 279 referred to.

THIS was a motion on behalf of the defendant to change the venue and transfer the action from the county court of the county of Victoria to the county court of the united counties of Northumberland and Durham, the cause of action having arisen and the parties having resided within the jurisdiction of the latter court.

The plaintiff filed an affidavit by his solicitor setting forth that the action could be more conveniently tried at Lindsay in the county of Victoria, and asked that an order be made for the trial at that place.

On November 29, 1904, the motion was argued.

H. E. Rose, for the defendant.

J. Grayson Smith, for the plaintiff.

November 30, 1904. THE MASTER IN CHAMBERS:—It is admitted that the case comes within Con. Rule 529 (b) which in *Corneil v. Irwin* (1903), 2 O.W.R. 466 I held to apply to the county court. I refer to what is said as to the proper practice in these cases to *Brown v. Hazell* (1903), 2 O.W.R. 785.

For these reasons the order should *prima facie* be made. In this case it ought to go with costs to defendant in any event.

There is nothing to justify what was said in *Pollard v. Wright* (1895), 16 P.R. 505, to be necessary to have a change of

venue. Not only is there no proof of "a very *strong case*" but strictly speaking there is no proof that can be considered. The only affidavit is one of the plaintiff's solicitor. According to *Hood v. Cronkrite* (1868), 4 P.R. 279 (*per* Draper, C.J.) affidavits on these motions should be made by the party and not by his solicitor who can only repeat what his client has told him. Attention was previously drawn to this in *Baker v. Weldon* (1903), 2 O.W.R. 432, at p. 434.

In the present case the solicitor's affidavit is vague and indefinite. If the plaintiff could not speak more positively and precisely he could not expect to obtain an order to have the trial at Lindsay.

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[DIVISIONAL COURT.]

D.C. WILLIAM BLACKLEY, LIMITED, v. ÉLITE COSTUME CO., LIMITED.

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Jan. 11.

Writ of Summons—Service Out of the Jurisdiction—Contract to be Performed in Ontario—Con. Rule 162 (e).

The defendants, carrying on business in Montreal, gave an order in writing to the plaintiffs' traveller while he was there, which was to be and was accepted by the plaintiffs by letter from Toronto, the plaintiffs' place of business:—

Held, upon the facts, that an acceptance by post was within the contemplation of the parties, and that the contract was made when the plaintiffs' letter accepting the order was mailed.

Plaintiffs' claim was endorsed for breach of contract and for goods sold and delivered. The contract provided that the goods were to be delivered F.O.B. at Toronto:—

Held, that the property in the goods passed on such delivery being made and that a breach of the contract by non-acceptance was a breach within Ontario of an obligation of a contract to be performed within Ontario.

Held also, that, even if the rule of law, that a debtor must seek out his creditor to pay him, unless the application of it is inconsistent with the terms of the contract, is to be excluded, it was in the contemplation of the parties that payment was to be made at Toronto and the obligation to pay was therefore one to be performed in Ontario.

Held, also, that an order for service out of the jurisdiction under Con. Rule 162 (e) was properly made.

Difference between the Rule in Ontario and the Rule in England considered. Judgment of Britton, J., affirmed.

THIS was an appeal from the judgment of Britton, J., affirming a judgment of an Official Referee made in Chambers, refusing to set aside an order allowing service of the writ of summons to be made out of the jurisdiction, but giving the defendants leave to enter a conditional appearance.

The appeal was heard on the 23rd December, 1904, before a Divisional Court composed of MEREDITH, C.J.C.P., MACMAHON and TEETZEL, JJ.

George Kerr and *Joseph Montgomery* for the appeal. The defendants gave the plaintiffs an order in writing in Montreal to ship certain goods to them F.O.B. Toronto. No place of payment was designated in the order. The question is therefore, where payment was to be made for the goods when so delivered. Con. Rule 162, (e) provides that the action may be brought in Ontario if the contract is *to be performed within Ontario*. As no place of payment was designated in the order, or agreed upon by the parties, the action cannot be maintained

in Ontario, and the order allowing the service of the writ should be set aside. It is not sufficient to say that the payment might have been made within the jurisdiction, it is necessary that the plaintiffs should show that either by the terms of the contract, or by implication, the defendants were bound to make payment in Ontario: *Comber v. Leyland & Bullins* [1898], A.C. 524. The evidence shows that payment was intended to be made in Montreal, and therefore the action cannot be maintained in Ontario.

R. W. Eyre and E. E. Wallace, contra. The goods were deliverable in Toronto and as soon as they were put on board the train the property passed (stopped by the Court on that point). The plaintiffs' letter accepting the order completed the contract and was binding from the time it was mailed. Even the letter refusing to accept had to come to Toronto. The contract was made here and the breach was here: *Phillips v. Malone* (1901), 3 O.L.R. 47; (1902), *ib.* 492; *Charles Duval & Co. v. Gans*, [1904] 2 K.B. 685; *Bell & Co. v. Antwerp, London & Brazil Line*, [1891] 1 Q.B. 103.

January 11. MEREDITH, C.J.:—This is an appeal by the defendants from an order of BRITTON, J., dated the 19th November, 1904, affirming an order of an Official Referee (McAndrew) dated the second of the same month dismissing an application which had been made to him by the appellants, in as far as it sought to have set aside an order of the Master in Chambers, made on the previous 21st September, allowing service of the writ of summons to be effected out of the jurisdiction and to set aside the writ and the service of it upon the appellants which had been effected at Montreal in the Province of Quebec.

By his order the Official Referee gave leave to the appellants to enter a conditional appearance, but they are not satisfied with that leave and have brought the present appeal in order to obtain the relief which was denied to them in Chambers.

The appellants are an incorporated company carrying on business and having their head office in Montreal, and the respondents, also an incorporated company, carrying on business in Toronto.

On the 12th March, 1904, the appellants gave an order in

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writing to an agent of the respondents for certain goods described in the order. The order was given to the agent at Montreal and the price of the goods ordered amounted to several hundred dollars; the agent was not a resident agent in Montreal but a traveller for the respondents.

The appellants knew that the respondents' place of business was at Toronto and that according to the ordinary course of business the acceptance of the order which they had given would be by letter from Toronto and an acceptance was necessary to the formation of a contract between the parties.

On the facts of this case an acceptance by post was within the contemplation of the parties and that being the case the contract must I think be taken to have been made when the respondents' letter accepting the offer was mailed at Toronto: *Henthorn v. Fraser*, [1892] 2 Ch. 27; *Bruner v. Moore*, [1904] 1 Ch. 305.

We are therefore I think bound to follow the decision of a Divisional Court in *Phillips v. Malone*, 3 O.L.R. 492 and to hold that the order allowing service to be effected in Montreal was rightly made.

The *ratio decidendi* of that case was that the contract having been made in Quebec, the law of that Province as to the place of payment governed; and had the contract been made in Ontario, the decision would have been that the law of this Province, which is stated to be, that in the absence of a different agreement the debtor must seek out his creditor to pay him, would have been applicable.

It would perhaps be sufficient to rest our decision upon the authority of *Phillips v. Malone*, but in view of the able and strenuous arguments of the learned counsel for the appellants, we have thought it better to consider the question raised independently of the decision in that case, so that if we had come to the conclusion that we ought not to follow it, the appellants might have had the benefit of our referring the question which is raised to a higher Court for decision, under the provisions of sec. 81 of the Judicature Act.

The claim of the respondents, as indorsed on the writ, is for breach of contract and for goods sold and delivered; and it is quite clear that as respects the first of these claims, the order

was rightly made. The contract provides that the goods are to be delivered F.O.B. at Toronto. The property in the goods therefore passed to the appellants, upon such a delivery being made. And a breach of the contract by non-acceptance was a breach within Ontario of an obligation of the contract, to be performed within Ontario: *Nathan v. Seitz* (1888), 4 Times L.R. 570; *Empire Oil Co. v. Vallerand* (1895), 17 P.R. 27 the latter a decision of the Court of Appeal.

Our rule (162 e) is as follows:—

“The action is founded on a breach within Ontario of a contract wherever made which is to be performed within Ontario . . .”

The corresponding provision of the English Rule (Order 11 rule 1 (e)) is:—

“The action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, . . .”

It was contended in the earlier cases after the words “according to the terms thereof” were introduced into the rule, that it was necessary to give jurisdiction to the Court to allow service out of the jurisdiction, that it should be shewn that the contract ought, according to its expressed terms, to be performed within the jurisdiction, but that view has not prevailed.

The scope and meaning of the rule were considered in *Comber v. Leyland & Bullins* [1898] A.C. 524, and Lord Herschell expresses his opinion as to them in these words, “to justify the allowing service of a writ on a person outside the jurisdiction it is necessary to prove that according to the terms of the contract between the parties, some part of it at least ought to be performed within the jurisdiction in this sense, that the place for its performance, stipulated for either expressly or impliedly in the contract, is in this country . . . Now, it appears to me that there cannot be a breach, within the jurisdiction, of a contract unless some part of that contract was by its terms bound to be performed in the United Kingdom,” p. 529.

Where there is no expressed term of the contract as to the place of performance the contract itself and the facts which

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existed when it was made are to be looked at for the purpose of ascertaining whether there is any place impliedly stipulated for as the place of performance, which Lord Esher said "amounts to saying that the Court must look at the contract, and, construing it according to the ordinary rules of construction with regard to contracts, must see whether upon the terms of the contract, so construed, it appears to be one to be performed within the jurisdiction": *Bell & Co. v. Antwerp, London and Brazil Line*, [1891] 1 Q.B. 103 at p. 108.

Some of the observations of Lord Esher would seem to indicate, that in his view the rule is to be read as if it had provided that the contract must be one, which according to the terms of it ought to be performed within the jurisdiction and there only. He says, p. 107, "Where there is no place named for payment of a debt, I think the debtor is bound to pay the creditor on demand, though it is true that, where the contract does not make a demand previous to action a condition precedent, the creditor need not demand his debt otherwise than by bringing his action; he may in that case bring his action without previous demand, and say that the debtor owes him the money, and it is the duty of the debtor to come to him and pay the debt. Where a debtor is bound to pay his creditor on demand, the creditor need not demand his debt at the debtor's place of business or dwelling house, or any particular place, he may demand payment from his debtor wherever he may find him. Wherever he finds the debtor and demands his debt, the debtor is bound to pay him then and there. Payment of the debt has not to be made in any specified place, but may be any where."

If the view of Lord Esher was what his observations seem to indicate it is not I think supported by the authorities or consistent with several decisions, one of them his own—which have never been over-ruled or even doubted. I refer to *Green v. Browning* (1876), 34 L.T.N.S. 760; *Robey & Co. v. The Snaefell Mining Co.* (1887), 20 Q.B.D. 152; *Hassall v. Lawrence* (1887), 4 Times L.R. 23; *Golden v. Darlow* (1891), 8 Times L.R. 57; *Thompson v. Palmer*, [1893] 2 Q.B. 80, though it is proper to say that the first of these cases was decided before the Rule was amended so as to be in its present form.

What is said by the learned Lords, who made speeches in *Comber v. Leyland* is I think opposed to that view, particularly what was said by Lord Shand at pp. 533, 534 which I quote: "When it is shewn that a plaintiff is entitled to require the performance of a contract in this country, and that consequently a breach takes place in this country process may be served out of the country; but I hold upon the authority of these cases, (*Bell v. Antwerp, London and Brazil Line*, [1891] 1 Q.B. 103; and *The Eider*, [1893] P. 119) and believing them to be in accordance with the true construction of the language used, that the rule is limited to this, and that there is no right to serve out of the jurisdiction where the performance of the contract may be given either within the jurisdiction or abroad in the option of the party who has undertaken the obligation."

The English cases appear to indicate, that in determining whether there is an implied stipulation in the contract, although the contract is made in England, and according to English law the debtor must seek out his creditor to pay him, that rule of law is to be excluded and the question to be determined solely upon the construction of the contract itself of taking into consideration of course the facts which existed when it was made.

The words "according to its terms" were probably I think introduced so as to make it necessary to shew that in the entering into the contract, it was in the contemplation of the parties that it should be performed within the jurisdiction, so that the party to it resident out of the jurisdiction must be taken to have given "a sort of consent" as Lord Halsbury puts in *Comber v. Leyland* at p. 527, that wherever he may be living or wherever the contract may have been made, any question as to the thing agreed to be done may be litigated within the jurisdiction.

The omission of the words "according to the terms thereof" from our rule, I am inclined to think leaves it open in construing the contract, in order to determine whether it is to be performed within Ontario, to apply the rule of our law that the debtor must seek out his creditor to pay him unless the application of it is inconsistent with the terms of the contract construing it in the light of the facts which existed when it was made.

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But if the rule of our law is to be excluded, upon the facts of this case I am of opinion, that it was in the contemplation of the parties when the contract was made, that payment for the goods which were ordered by the appellant should be made at Toronto and that the obligation to pay was therefore one to be performed within Ontario.

The circumstances that the respondents desired the appellants to close the transaction with the agent in Germany of the manufacturers of the goods and that this agent proposed to draw on the appellants for the price is immaterial I think and can afford no light as to the meaning of the contract, settlement with the agent not having been in the contemplation of the parties when the contract was made and being expressly repudiated by the appellants themselves as a thing which it was not incumbent on them to do.

For these reasons, I am of opinion that the respondents made a *prima facie* case as to the contract and that there had been a breach within Ontario of the obligation, which under it rested on the appellants to accept and pay for the goods and was to be performed within Ontario: that their application was rightly refused and that this appeal therefore fails and should be dismissed with costs.

MACMAHON and TEETZEL, JJ., concurred.

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[IN THE COURT OF APPEAL.]

REX V. IRVINE.

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Feb. 24.

Criminal Law—Criminal Code sec. 449 (b)—Trading or Trafficking in Bottles Having on them the Name of Another Person—Non-Registration.

Section 449 (b) of the Criminal Code provides that any manufacturer, dealer or trader or bottler is guilty of an indictable offence, who, without the written consent of such other person, trades or traffics in any bottle or syphon which has upon it "the duly registered trade mark or name of any other person":—

Held, that this enactment was violated by trading or trafficking in bottles having on them the name of another person, though such name was not registered.

The section in the French version of the Code referred to.

CASE reserved by the police magistrate at Ottawa.

The facts and the case are sufficiently set out in the judgment.

The argument took place on the 16th February, 1905, before MOSS, C.J.O., OSLER, MACLENNAN, GARROW and MACLAREN, JJ.A.

Gordon Henderson, for the defendant, put in a written argument. The original section 449 of the Code referred only to bottles "with a trade mark;" and bottles with the name only on them were used indiscriminately. The section now reads "which has upon it (the bottle) the duly registered trade mark or name of another person." That means protection by registering the trade mark or name. Here the name only was used, and it was not registered as a trade mark: R.S.C. 1886, ch. 63, 53 Vict. ch. 14 (D.), 54 & 55 Vict. ch. 35 (D.).

John R. Cartwright, K.C., Deputy Attorney-General, contra. The word "registered" in sec. 449 (b) only applies to trade marks, and is not to be read also with name. This is shewn by the language used in sub-sec. 2, and by the French version.

February 24. The judgment of the Court was delivered by OSLER, J.A.:—The defendant, who elected to be tried summarily, was charged with an offence under section 449 (b) of the Criminal Code as amended by 63 and 64 Vic. ch. 46 (D.) (see sec. 3 of that Act), which enacts that, "Every one is guilty of an indictable offence who (b) being a manufacturer, dealer or trader, or a bottler,

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without the written consent of such person, trades or traffics in any bottle or syphon which has upon it *the duly registered trade mark or name* of another person, or fills such bottle or syphon with any beverage for the purpose of sale or traffic."

The case set forth that one Eugene Mireault, a ginger ale and soda water manufacturer, in the city of Ottawa, had his name blown, stamped, or permanently affixed on four bottles: that the defendant of the same place, who was also a ginger ale and soda water manufacturer, dealer, trader and bottler, on the 26th July, 1904, at the city of Ottawa, filled the said four bottles with beverage, labelled the same with his label and placed them upon the market for the purpose of sale.

At the close of the case for the prosecution defendant's counsel moved for the dismissal upon the grounds

(1) That there was no evidence that Mireault's name was duly registered;

(2) That as a fact his name is not duly registered as required by the Canadian Trade Mark and Design Act, R.S.C. 1886, ch. 63, as amended by the 53 Vict. ch. 14 (D.), and by the 54 & 55 Vict. ch. 35 (D).

Counsel for the prosecution admitted that he had not shewn that his name was duly registered and that as a fact it was not duly registered, but relied simply upon the words "or name of another person," in the fourth line of the sub-section.

The magistrate overruled the objections, convicted and fined the defendant, and reserved the following question:—"Is the name blown, stamped or permanently affixed upon a bottle sufficient, or does it require registration as in the case of a trade mark?"

It may be observed that in the question stated the magistrate uses the words "blown, stamped, or permanently affixed." These are taken from the repealed section 449. The substituted section speaks merely of any bottle or syphon which has upon it (not saying how this is to appear) the duly registered trade mark or name of another person.

This, however, does not affect the disposition of the case.

I am of opinion that it is not necessary that the name should be registered. Assuming that the mere words composing

the name of the "other person" may be the subject of, registration as a trade mark, then, if such name be so registered, it is registered as a trade mark and becomes *ipso facto* a duly registered trade mark. It cannot be registered otherwise than as such. When, therefore, the Parliament made it an offence to trade or traffic in any bottle, etc., which has upon it the duly registered trade mark *or name* of another person they must have meant something more than one having a duly registered trade mark upon it, and to forbid also (subject to the provisions of the section) trade or traffic by one person in bottles with the name of another person which, as I have said, is as such, or otherwise than as a trade mark, incapable of registration, upon them. The object of the legislature evidently was to prevent, as far as possible, the easy commission of a fraud of that kind. In the French version of the Code the words in sec. 449 (*b*) are "le marque de commerce dûment enregistrée *ou le nom* d'une autre personne," and indicate more plainly that the words "duly registered" are confined to the trade mark, and do not apply to the name.

Sub-sec. 2 of sec. 449 supports this construction. Though very loosely and inaccurately framed, and in some respects quite unintelligible, and differing from the French version it makes "the using by any manufacturer, dealer or trader (not saying 'bottler') other than such other person of any bottle . . . having upon it such trade mark *or the name* of another person" *prima facie* evidence that such use is unlawful within the meaning of the section.

I think, therefore, that the question should be answered by saying, that it is sufficient if the name of another person is upon the bottle, and that it is not necessary that such name should be registered as a trade mark.

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[IN CHAMBERS.]

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INNES v. HUTCHEON.

Feb. 27.

Replevin—Application for Order to Sell—Con. Rules 1097, 1098.

To obtain an order of replevin of some horses the plaintiff paid into Court \$2,000, and was paying over \$5 a day for their keep, and as no trial could be expected before the autumn, he applied under Con. Rules 1097 and 1098, for an order for sale :—

Held, that there was no power under the above Rules or otherwise to grant the order.

ON January 23rd a replevin order was granted in this action. Under this there were delivered to plaintiff six imported horses of considerable value. To obtain the order the plaintiff paid into Court \$2,000. The plaintiff applied under Con. Rules 1079, 1098* for an order for the sale of the horses in question.

The plaintiff, who had been appointed trustee in bankruptcy by the Sheriff's Court, of Aberdeenshire, Scotland, was in the same position under the Scotch Law in regard to the defendants as an assignee in bankruptcy would be in England.

The horses were at livery at a cost to plaintiff of over five dollars a day.

If the action was fought out it would become necessary to procure evidence from Scotland, and no trial could therefore be expected before the autumn sittings.

The motion was argued before the Master in Chambers, on February 25th, 1905.

G. Larratt Smith, for plaintiff.

W. A. Lamport, for defendant.

* C.R. 1097. The Court or a Judge may, on the application of a party, order the sale, by any person or persons named in the order, and in such manner and on such terms as may seem just, of any goods, wares, or merchandise which may be of a perishable nature or likely to be injured from keeping, or which for any other reason it may be desirable to have sold at once.

1098. The application may be made by the plaintiff at any time after the right appears from the pleadings, or (if there be no pleadings) is made to appear by affidavit or otherwise.

February 27. THE MASTER IN CHAMBERS [after stating the facts]:—There can be no doubt under the facts that it is a proper case for the order asked for if there is power to make it.

In Holmested and Langton's Judicature Act, at p. 1218 certain cases are cited on Con. Rule 1097. None of these is similar to the present.

This is not an interpleader proceeding. And it does not appear why the plaintiff requires any such order as he is seeking, or what protection it would afford him if granted.

He is free to sell if he is prepared to run the risk of an action for damages if he fails in the present action.

No order made now could bind the defendant. The plaintiff is no doubt acting properly in the course he has taken in acquiring possession of the horses; and he must continue to use the same good judgment in the matter. It looks as if the plaintiff might sell all except perhaps the one claimed by the defendant's wife. But the whole matter rests with him. The motion cannot succeed. But as it was reasonable the costs may be in the cause.

A. H. F. L.

Master in
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Feb. 11.

DAVIDSON V. WATERLOO MUTUAL FIRE INS. CO.

Fire Insurance—Oral Application—Ownership of Goods Insured—Lessees—Notice to Agents—Policy Differing from Application—Statutory Conditions 2, 10.

The plaintiffs having an insurable interest, as lessees, in machinery, applied verbally to the defendant's agents for insurance to whom they communicated the state of the title, the name of the owners, and the nature of their interest in the machines. The agents had authority to accept the risk, receive the premium and issue an interim receipt, which they did. They also partly filled up an application form, not containing any statement as to the nature of the ownership, and signed it in the name of the plaintiffs, but without the knowledge, consent or authority of the latter. A policy was issued and sent to the plaintiffs, which contained the statement that "the property is being held by the assured as owners."

Statutory Condition 10 provides that the company is not liable for loss of property owned by any other party than the assured, unless the interest of the assured is stated in or upon the policy :—

Held, that the plaintiffs were not precluded from recovery by this condition inasmuch as the defendants had notice through their agents of the real interest of the plaintiffs, and it was their duty to have indorsed on the policy the necessary statement as to it, or at all events they were estopped from setting up the condition.

Held, also, that the plaintiffs could invoke the 2nd statutory condition, under which, after application for insurance, it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application, unless the company points out in writing the particulars wherein the policy differs from the application. There is no reason for confining the operation of this condition to a written application.

THIS was an appeal by the defendants from the judgment of Teetzel, J., in favour of the plaintiffs at the trial of this action.

The circumstances of the case are fully stated in the judgments. The appeal was argued on September 19th, 1904, before MEREDITH, C.J.C.P., and IDINGTON and MAGEE, JJ.

R. McKay for the defendants contended that in the plain construction of the contract, the judgment appealed from could not be supported, and referred to *Western Assurance Co. v. Temple* (1901), 31 S.C.R. 373; *Keefer v. Phoenix Ins. Co. of Hartford* (1901) *ib.* 144.

J. Lorn McDougall, for the plaintiffs, contended that the defendants were estopped from setting up statutory condition No. 10, and relied on statutory condition No. 2; and further that a lessee in possession is an owner in a sense sufficient:

Lister v. Lobley (1837), 6 L.J.N.S. (K.B.) 200, 7 A. & E. 124; *Graham v. Ontario Mutual Ins. Co.* (1887), 14 O.R. 358; *Stillman v. Agricultural Ins. Co.* (1888), 16 O.R. 145; *Wing v. Harvey* (1854), DeG., M. & G. 265; Beach on Insurance (1895), p. 340 *et seq.*; Stroud's Judicial Dict., vol. 2, p. 1387, *sub voc.* "owner."

McKay, in reply, contended that it was not a question of materiality here.

February 11th. MEREDITH, C.J.:—This is an appeal by the defendants from the judgment in favour of the respondent pronounced by my brother Teetzel after the trial of the action before him sitting without a jury at Ottawa on May 9th, 1904.

The action is brought to recover from the appellants \$2,500, the amount of the loss which the respondents sustained by the destruction by fire of certain machinery which was on their premises at the time when the fire occurred and against the loss by fire of which the respondents allege the appellants had contracted to indemnify them to the extent of \$2,500.

Since the argument further documentary evidence has been put in by leave in support of the respondents' case.

The machinery consisted of three box-making machines manufactured by the Dove-tail Box Company of St. Paul, United States, with their attachments, including shafting, pulleys and belting.

The respondents, though not the owners of the machines, were lessees and had an insurable interest in them to the full extent,—\$2,500.

The state of the title, the name of the owners of, and the nature of the respondents' interest in the machines, were communicated to the agents of the appellants to whom the application for the insurance was made.

The agents were also at the same time informed that the owners of the machines had asked the respondents for an insurance of \$2,000 on them, and that the respondents had an interest in them and wanted \$500 more put on to make the insurance \$2,500.

The respondents had in fact contracted with the owners and lessors of them, and it was a term of their lease to keep the

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machines insured in the name of the latter against fire for not less than \$2,000 and the respondents had paid the duty on the importation of the machines into Canada, amounting to \$450 and the freight on them amounting to \$75.

The rent agreed to be paid was \$500 per annum, two years of which was paid in advance, and the respondents bound themselves to pay the rent for not less than five years before terminating the lease, which they were given the right to do on giving six months' notice in writing of their intention to terminate it and returning the machines within ten days after the expiration of the six months. The term of the lease was the life time of the patents which had been obtained for them, of which the lessors were the owners.

In case any part of the machines was required to be replaced the new part was to be procured from the lessors and paid for by the respondents, who were also made responsible for all accidental injury to the machines.

The machines themselves were worth probably from \$2,500 to \$3,000.

The application for the insurance was made on the 3rd of February, 1903, and was for an insurance for one year; it was verbal; one of the application forms of the appellants was partly filled up by the agents and signed in the name of the respondents per G. S., which are the initials of a member of the firm of R. Stewart & Son, who were the agents. This was done without the knowledge, consent or authority of the respondents.

Nothing is said in the form thus filled up as to the ownership of the property.

The agents had authority to accept the risk, receive the premium and issue an interim receipt on behalf of the appellants, and all this they did. The interim receipt bears date February 3rd, 1903.

The form purporting to be the application of the respondents for the insurance was forwarded by the agents to the head office of the appellants and a policy of insurance was issued by them and sent to the respondents, but no notice was given to them that the policy in any way differed from the contract which they had proposed in the verbal application which they had made to the appellants' agents.

In it the property insured is stated to be "more particularly described in the application for this insurance made by the assured and being represented in said application as otherwise not insured," and the policy contains the further statement following the words I have quoted, "and the said property aforesaid is being held by assured as owners."

The latter statement does not appear in the application form. Question 30. "Title—Under what title is the property to be insured held," which is the only question even remotely referring to the ownership of the property, being unanswered.

The description of the property which the application form contained was as follows:—

"On three box-making machines manufactured by the Dove-tail Box Company of St. Paul, U.S.A., with attachments thereto including shafting, pulleys, and belting only while contained in a three-storey brick felt and gravel roofed building while occupied only for the manufacture of wooden boxes by the assured."

As I have said, all the property was destroyed by fire during the currency of the policy, and this action is brought to recover \$2,500, the amount insured.

The respondents had, as I have also said, an insurable interest in the property at the time of the fire to the extent of at least \$2,500.

The only defence made is that the respondents are not by reason of the tenth statutory condition entitled to recover for the loss in respect of the three machines because, as it is pleaded, they were owned by a person other than the respondents, and the interest of the respondents in them was not stated in or upon the policy.

My brother Teetzel, having found the facts substantially as I have stated them, directed judgment to be entered for the respondents against the appellants for \$2,500 with interest and costs, and from that judgment the present appeal is brought.

I agree that the proper conclusion upon the evidence is that the insurance which the respondents proposed to the appellants' agents was one upon their insurable interest in the property which was, as they informed the agents, as to the machines not a full ownership, and the nature of which was truthfully stated

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to the agents, that that proposal was accepted by the agents who were thereupon paid the premium for the insurance for one year, \$140; that the agents thereupon issued to the respondents an interim receipt intending to insure them against loss in the sum of \$2,500 on their interest in the property as it had been described to them.

The interim receipt is for an insurance for twelve months from February 3rd, 1903, and is expressed to be subject to the approval of the head office, and the conditions of the company's policy, and the following statement appears at the foot of it, "unless previously cancelled this receipt binds the company for thirty days from the date hereof and no longer, after which time the risk shall be considered to be cancelled and of no effect. If the insurance be declined the amount received will be refunded less the premium for the time insured, if confirmed a policy will be issued in due course."

Assuming that the agents had no authority to bind the appellants, to an insurance for twelve months and that all they were authorized to do was to receive the application and to grant an interim receipt in the form in which that issued to the respondents was drawn, and that the respondents must rely upon the acceptance by the appellants of the contract which the respondents had proposed to them through their agents, and the policy issued upon their application and sent to them, are the respondents precluded by the provisions of condition 10 from recovering for their loss?

It is to be noticed that there is nothing in the application form or in the interim receipt to indicate that the appellants will not or do not undertake to insure against loss any one who is not the owner of the property insured, and nothing to indicate that in order that the insurance applied for shall operate, if the insured is not the owner of the property he must state what is his interest in it.

It is apparent that the appellants did not deem it important that they should know what the interest of the respondents in the property really was. The application form contains no less than forty questions and not one of them is pointed directly, at all events, to ascertaining what the interest of the applicant in the property proposed to be insured is. As I have said, the only

question which is even remotely directed to such an inquiry is the thirtieth, which seems to have been applicable to an insurance on buildings rather than to one upon personal property, and even that question is unanswered.

The provision of condition 10* is not that if the nature of the insured's interest is not disclosed in the application the policy is to be void, or that the policy is not to cover any insurable interest of the insured unless he is the owner of the property insured, but that the company is not liable for loss of property owned by any other party than the assured unless the interest of the assured is stated in or upon the policy.

The policy on its face contains a covenant on the part of the appellants to make good to the assured all such loss or damage by fire not exceeding the amount insured on the property as should occur during the continuance of the policy and except in as far as, if at all, this covenant is qualified by the 10th condition the appellants would be liable to make good the loss to the extent of the insurable interest of the respondents in the property whatever the nature of that interest might happen to be.

The appellants had notice through their agents of the real interest of the respondents in the property insured, and it was, I think, therefore, their duty to have indorsed on the policy the necessary statement as to it or at all events they are estopped from setting up the 10th condition to defeat the respondents' claim.

There is nothing to shew that the agents had not the necessary authority to make the indorsement on the policy required by the 10th condition; they were the general agents at Ottawa of the appellants, and their authority as described by one of them was wide enough, as it appears to me, to cover the doing of such an act on behalf of their principals.

If I am right in this view, I am unable to see why the appellants should be permitted to avail themselves of the failure of their agents to do this and thereby make the policy a real

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*Statutory condition 10 (R.S.O. 1897, c. 203) is as follows:—The company is not liable for the losses following, that is to say (a) for the loss of property owned by any other party than the assured, unless the interest of the assured is stated in or upon the policy. . . .

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security to the respondents instead of being, if the contention of the appellants is well founded, a worthless piece of paper and indeed worse than that—something to lead the respondents to believe that they had the security against loss by fire which they had applied for and for which they had paid their money, when in truth they had not.

There is another ground also upon which, in my opinion, the respondents were entitled to succeed.

Their application was, as has already been said, a verbal one, and if the policy gives them a contract different from that for which they applied, as it does if the appellants' contention is well founded, I do not see why the respondents may not invoke the provisions of the second statutory condition to prevent the appellants from setting up the provisions of the 10th condition on which they rely as an answer to the respondents' claim.

The second statutory condition is as follows :

"After application for insurance it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application unless the company points out in writing the particulars wherein the policy differs from the application."

I see no reason for confining the operation of this condition to a written application, and there is no injustice done to the insurer if he chooses not to require the application to be made in writing and to trust to its being correctly communicated to him by his agent, in holding him bound by the application that has in fact been made to his agent. He has the remedy in his own hands; he may refuse to accept the risk at all unless the application is put into writing and signed by the applicant, and if he chooses not to do this, and he is misled and suffers loss why should that loss not fall rather upon him than upon the insured? It may well be that the draughtsman of the condition in framing it had in view just such a case as this, but however that may be, the condition is, I think, applicable to a verbal application.

Then what is the effect of the condition? Its purpose is manifestly, I think, to secure to the applicant the very contract for which he has applied, unless the insurer informs

him in writing that the policy sent to him is a different one and points out the particulars in which it differs from his application. Whether the condition requires the policy to be read just as it would have been drawn had it been written in accordance with the terms of the application, or affords a ground for the rectification of the policy so as to make it agree with the application, or precludes the insurer from setting up any term of the policy as issued which is inconsistent with the terms of such a policy as would have been issued had it been written in accordance with the terms of the application, it is, I think, unnecessary to consider, because in my opinion in one or other of these ways the respondents are entitled to rely on the condition to meet the defence which the appellants have set up, and even if the condition affords only ground for the rectification of the policy, the respondents are entitled to recover without what Patterson, J.A., in *Billington v. The Provincial Insurance Company* (1877), 2 A.R. 158, at p. 185, called the useless form of having the policy actually reformed.

In cases such as *Fowler v. Scottish Equitable Life Ins. Society* (1858), 28 L.J. Ch. 225, the difficulty in the way of the plaintiff obtaining a reformation of the policy was that there was no *consensus ad idem*; he had intended to effect the insurance only on the terms that were proposed to the agent, but the head office from which the policy issued intended to enter into the contract only on the terms of the policy as issued.

Condition 2, as I read it, gets rid of such a difficulty as stood in the way of the plaintiff in the case just referred to, and its effect is, I think, to secure to the applicant for insurance the very contract for which he has applied, though the policy sent to him is a different one, unless the notice for which it provides is given by the insurer. This is no more in such a case as this than imputing to the insurer the knowledge which his agent has and I can see no injustice in doing that.

For these reasons I am of opinion that the judgment of my brother Teetzel was right and should be affirmed, and that the appeal should be dismissed with costs.

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IDINGTON, J.:—The plaintiffs were manufacturers of sash doors, blinds, etc., and carrying on business at Ottawa. For the purpose of one branch of their business, they, on September 12th, 1902, leased from the Dove-tail Box Machine Company, of St. Paul, Minnesota, one set of dove-tailing machinery, parts of which were covered by patents. The lease was for six years and that was the life of the patents. The plaintiffs agreed to pay \$2,500, of which \$1,000 was paid in advance, by way of rental for the use of this machinery. They became by the lease bound to keep the machinery in repair and to be responsible for all accidental injuries to the machinery, and to deliver it up at the end of the term in such good repair. They were bound to insure in the lessor's name against fire for not less than \$2,000 for each set of machinery. They were expressly prohibited from assigning or sub-letting and confined to the use of the machinery at their place of business in Ottawa. The lease contained a license of the patent rights.

It cost the plaintiffs considerable money for freight and duty, and expense of installing with the necessary hanging and connecting appliances of this machinery, so that they would seem to have had a very substantial insurable interest beyond their rights as lessees and the liability to keep insured and restore in good repair.

The machinery was destroyed by fire on the 4th of June, 1903.

The plaintiffs had applied to the defendants, through their agents R. Stewart & Son in Ottawa, for insurance on this machinery to the extent of \$2,500. The evidence of Mr. Rose, the plaintiffs' bookkeeper, who attended to the business, is on this point as follows:—

Mr. McDougall questioned *Mr. Rose*. "What took place between you and *Mr. Gordon Stewart* in the presence of *Mr. Robert Stewart*, the father?" A. "I told him that we wanted \$2,500 placed on the machinery, that the machinery was on lease, that the Dove-tail Box people asked us for \$2,000 of insurance, and that we had an interest in them and wanted \$500 more put on, to make the policy \$2,500; that is all."

Q. "Did you sign any application?" A. "No."

Q. "How long did the interview take." A. "About ten minutes, I suppose."

There never was anything further required by the plaintiffs to be done in the nature of application for this insurance. The defendants' agents signed, without any request of the plaintiffs, the usual blank form of application used by the defendants, but omitted to answer more than three of the questions of which there are only forty-one in this form for an applicant to reply to. These three that the defendants' agents inserted answers to, covered other insurance, the question of applicants ever having had insurance cancelled or declined, and danger of incendiarism. Each was answered in the negative.

A printed form of slip was filled up to shew the property to be insured, amount required to be insured, cash value, rate, and the amount of premium. This form would seem to have been filled up by the agents and then a typewritten slip attached by them to describe the property. This slip does not seem to have been satisfactory to the defendants' officers at their head office, for another, with some changes, was written by them, and attached also to the form of application.

This latter seems to have been the one followed by the clerk, who filled up the policy, which was issued dated July 3rd, 1903, and is now sued upon herein. The statutory conditions of R.S.O. 1897, ch. 203, as well as some others appear entered on this policy.

The defendants set up the statutory conditions and rely especially upon No. 10 thereof, which, in substance, is as follows: "The company is not liable for the losses following, that is to say (a) for the loss of property owned by any other party than the assured, unless the interest of the assured is stated in or upon the policy. . . ."

In considering this condition regard must be had to the 2nd statutory condition, which is as follows: "*After application for insurance it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application, unless the company points out in writing the particulars wherein the policy differs from the application.*"

The only application ever made by the plaintiffs for insurance on the goods in question, was that testified to by Mr. Rose.

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In response to that the defendants sent to the plaintiffs the policy now in question.

It is not pretended that they complied with the requirements of this No. 2 statutory condition by notifying or pointing out in writing, or in any way, the clear departure they now allege from the terms of the application. The policy thus sent was received and relied upon by the plaintiffs, who paid the sum of one hundred and forty dollars for insurance, such as they asked for. It cannot be doubted that if the plaintiffs had put in writing just such an application as Mr. Rose's evidence sets forth, and the defendants had sent this policy in reply thereto, they would be liable. It can make no difference because it happens to be an oral application. The defendants seek refuge in the printed form that their local agents and their officers at the head office, chose to write something upon. That was not the application of the plaintiffs. They never saw it or heard of it. Surely they cannot be held responsible for what the defendants' agents presumed to do? There is nothing to shew that they asked the local agents to do anything of the sort that was done.

And what after all can be made of the printed form so very defectively filled up? Its heading purports to be an application of the plaintiffs for \$2,500 insurance on property correctly described.

They were entitled to get this insurance upon these goods. They as lessees had paid and become liable for over three thousand dollars that they would lose, if a fire occurred and destroyed the property. They had bound themselves to return the goods and they had covenanted to have them insured. It is true that as between them and their lessors their insurance was to be in the lessors' name to the extent of two thousand dollars. But how can that so go to the root of the matter as to prevent them from applying for insurance? Is this not an answer to what is set up here, even if we are to read the heading of the form, and so much of it as filled up, as the application of the plaintiffs and not as that of the defendants' own agent.

On that as an application, they had at the head office no right to assume that the plaintiffs' request for insurance was to be in the character of an owner in the restricted sense unqualified

in any way, The word "owner" is defined in the Standard Dictionary as: "One who owns, or has the legal title, the rightful proprietor; *also, one who has possession.*" See also Stroud *sub voc.*, and the case of *Lister v. Lobleby*, 7 A. & E. 124. All these shew, I think, that the word "owner" in the body of the policy may well be read in a sense wide enough to cover the different insurable interests the plaintiffs had. I am not to be taken as reading the word owner as used in No. 10 condition in this wide sense. Different considerations are applicable to its use. These may or may not import a different meaning.

Can there be said to have been a duty resting upon the plaintiffs to read the policy?

Every policy must by law be *prima facie* at least subject to the second condition. This seems to be one case where the maxim "every man is supposed to know the law" has a beneficial result. Every man whether he knows the law or not, is entitled now to assume when he gets a policy, that it is just that which will carry out the insurance he applied for, unless the company notify him otherwise in writing. I think the plaintiffs were entitled to assume that the policy they got did so.

The insurable interest the plaintiffs had was quite equal to that which any absolute owner could have. Their contract as bailees to return the article made it so. See the cases in May on Insurance, 4th ed., vol. 1, sec. 80. The insured is not bound to state the nature or particulars of his title, unless they are inquired about, or required by the provisions of the policy to be disclosed. See May, *ib.* 4th ed., sec. 285.

I think, therefore, that the plaintiffs had such an insurable interest as to entitle them to recover the amount of damages awarded by the learned trial judge, that they were entitled to assume that the policy sent complied with the parol application they made, and that the defendants are in the absence of written notice to the plaintiffs, bound by statutory requirements, that the policy is to be deemed to be in accordance with the application, and that until the defendants comply with the second condition, they cannot invoke the protection of the 10th condition to defeat this action. The argument presented by the defendants' counsel, that the plaintiffs are suing on the policy and therefore bound by this 10th condition is thus, I

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think, disposed of. There is, however, much to be said in support of the ground taken by the respondents' counsel, that the agent's knowledge of the conditions of the title as imparted to him by the terms of the parol application, independently of the 2nd condition, estopped the defendants from setting up this 10th condition.

It was said that no authority existed to support the proposition that knowledge, notice, or parol agreement, or understanding of an agent, could annul such a condition. It may be conceded, I think, that no express English or Canadian authority does exist. Most of the cases here and in England which have raised the question of title in, or want of title in the insured, have come up under the head of a representation of title held to be warranty thereof, or misrepresentation amounting to fraud and entitling the insurer to a rescission of the contract.

The form of conditions raising the question in most of the cases differs from this. The point was taken in the case of *McLeod v. Citizens Insurance Company* (1878), 3 R. & C. (N.S.) 156, in regard to a condition, which was somewhat the same as this, but the case turned on other grounds, and the conclusion reached was without reference to the American cases that then existed in support of the proposition that such a condition as in question here, could be held to have been waived or defendants estopped by knowledge in or notice to the agent, from setting up the contention here set up.

The earliest case I have seen is *Atlantic Insurance Company v. Wright* (1859), 22 Ill. 462, 474, in the Supreme Court, where the condition was: "If the interest in the property to be insured be a leasehold interest, or other interest not absolute, it must be so represented to the company, and expressed in the policy, in writing, otherwise the insurance shall be void," and it was held that knowledge of a general agent must be imputed to the company and then the company was estopped from setting up their condition.

This was followed in the case of *Germania Fire Ins. Co. v. Hick* (1888), 125 Ill. 361, where the building insured was on leased land and the case otherwise seems to have been on all fours with the case now in hand.

Many similar cases and rulings are cited in Beach on

Insurance, sec. 392, and the case of *Van Schoick v. Niagara Fire Insurance Company* (1877), 68 N.Y. 434, seems much in point, the lease having simply been known to the agent. The Court held, after an able review of the cases, that the company was estopped.

In the course of this review the learned Judge says, at p. 438:—"Whether a fact, thoroughly well known and comprehended by both sides of the contract, before it is delivered, may, by force of some condition, *crouched unseen in the jungle of printed matter with which an ordinary policy is overgrown*, make a defence for the company or," etc., and this quaintly but aptly describes the condition of things in this country before the statutory conditions were adopted.

The definition of estoppel by some high authorities may suggest some difficulty in adopting these cases for our guidance. It may be said plaintiffs did nothing on the faith of something that the defendants said or did.

Did they not pay their money on the faith of the defendants' agent undertaking that an insurance, such as desired, would be effected?

Did the defendants sending a policy upon the property, lead the plaintiffs to suppose the terms made with the agent had been adopted or accepted?

I do not desire to pass upon this as for my present purpose it is not necessary.

I have adverted to the cases and what they suggest, to shew that for a long time this kind of condition has been in use and held by enlightened lawyers as not an insurmountable difficulty, when something such as we have here in hand has happened.

There is evidence from which the learned trial Judge could properly infer that the firm of R. Stewart & Son were general agents of the defendants or held out as such, by the defendants, with power to accept the risk on the terms upon which the plaintiffs paid their premium. Whatever limitations may have existed upon these agents' authority were not made to appear to the plaintiffs and others having business with the company.

I am of opinion that this appeal should be dismissed with costs.

MAGEE, J., concurred.

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[IN THE COURT OF APPEAL.]

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Jan. 23.

RE MCINTYRE, MCINTYRE

v.

LONDON AND WESTERN TRUSTS COMPANY ET AL.

Infant—Maintenance—Contingent Legacies—Interest as Maintenance.

A testator bequeathed to his two infant sons \$4,000 each, contingent upon their attaining 25 years of age; the only other provision for them was a gift to each of one-tenth of the residuary estate:—

Held, affirming the decision of Street, J., reported 7 O.L.R. 548, that these legacies carried interest from the death of the testator, and that a certain sum should be paid annually out of such interest to their mother for the purposes of their maintenance, and the executors should set apart the full amount of \$8,000 to provide for the payment of such legacies at the time provided, but that the question of the proper amount to be allowed, having regard to the income from the infants' shares in the residue should be now settled by the Master unless otherwise agreed upon.

In such cases the amount to be allowed for maintenance must be governed by a consideration of the other circumstances, and a due regard to such other sources or funds as may be properly resorted to for such purpose.

THIS was an appeal by the plaintiff, David McIntyre, from so much of the judgment of Street, J., reported 7 O.L.R. 548, as held that the infants were entitled to interest by way of maintenance from the death of the testator, and upheld the order of Lount, J., on March 16th, 1901, directing payment of \$100 per annum out of the income to be derived from the legacies of \$4,000 each bequeathed to Mowat McIntyre and Ross McIntyre, and so far as it declared that sums of \$4,000 each should be set aside to provide for the said two legacies.

The provisions of the will in question, and other circumstances of the case are sufficiently stated in the report below, and in the judgments of this Court.

The appeal was argued on November 16th, 1904, before MOSS, C.J.O., MACLENNAN, OSLER, MACLAREN, and GARROW, J.J.A.

A. B. Aylesworth, K.C., for the appellant, contended that Street, J., had not interpreted the will in the way intended by the testator; that the general rule is that interest is not payable when a legacy is to be paid at a future date, though there are

exceptions to this rule, as stated in Williams on Executors, 9th ed., pp. 1268-9, on which Street, J., relied; that it is merely a rule of construction, and the presumption as to the testator's intention is rebutted when it is seen that the testator has provided other means of maintenance, as here: *Hearle v. Greenbank* (1749), 3 Atk. 695, 716; *Martin v. Martin* (1866), L.R. 1 Eq. 369. He also contended that the judgment of the Divisional Court herein, reported 3 O.L.R. 212, was inconsistent with carrying on further payments of the sums directed in the order of Lount, J.

J. Folinsbee, for various adult brothers and sisters of the appellant, contended that the rule is that income on a contingent legacy goes into the residue, and forms part of it; that there was no rule justifying the allowance of interest as directed here, unless the equitable rule that the Court will not presume that the testator meant his children to be without support; but that if equity was to be invoked, the children should do equity, and if maintenance was provided till they came into their money, they should be required then to pay it back; that if maintenance was required out of the residue, it should come out of their share of the residue: *In re George* (1877), 5 Ch.D. 837, 843; *In re Dickson, Hill v. Grant*, (1885), 29 Ch.D. 324, 331, 339; *In re Moody, Woodroffe v. Moody*, [1895] 1 Ch. 101, at p. 109; and that there was no authority to order maintenance as here, unless in case of real necessity: *Perley on Interest*, p. 118.

H. Cronyn, for the Official Guardian, contended that the infants did require allowance for maintenance, and cited Williams on Executors, 9th ed., p. 1291; *In re Bowlby, Bowlby v. Bowlby*, [1904] 2 Ch. 685; *Re Moody, Woodroffe v. Moody* [1895] 1 Ch. 101, at p. 108; *Binkley v. Binkley* (1869), 15 Gr. 649; *Spark v. Perrin* (1870), 17 Gr. 519; *Rees v. Fraser* (1879), 26 Gr. 233; *Haughton v. Harrison* (1742), 2 Atk. 329, 330; *Re Campbell* (1899), 18 P.R. 400; Chambers on Infants, p. 301. He also contended that there is no certainty or practice by which trustees can be compelled to set aside a lesser sum than the principal of such contingent legacies: *In re Hall, Foster v. Metcalfe* [1903] 2 Ch. 226.

Aylesworth, in reply, contended that it all came down to what was the true construction of the will, and cited *Guthrie v. Waldron* (1883), 22 Ch.D. 573.

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January 23. Moss, C.J.O.:—The question chiefly discussed upon this appeal was whether Street, J., was right in declaring that the legacies of \$4,000, given to each of the testator's infant sons, Mowat and Ross McIntyre, carry interest from the death of the testator for the purposes of their maintenance, and in directing the retention and setting apart by the executors of the sum of \$8,000 to provide for the payment of \$4,000 each to the infants when they attain the age of 25 years, and the payment (subsequent to an order made by Lount, J., on March 16th, 1901) out of the interest or income to accrue from the said sums, of the sum of \$200 annually to their mother, or such further or lesser sum as may be needed for their maintenance, and may be subsequently ordered to be paid by a Judge in Chambers, until they attain the age of 21 years, and that any interest not so distributed when the infants attain that age be added to the residue of the estate.

By his will the testator after providing for payment of his debts and funeral expenses bequeathed to his wife the sum of \$400 a year during her life to be paid quarterly out of his general funds, and also \$100 out of his homestead farm for 10 years "until my sons Mowat and Ross have possession." He then devised his homestead farm to his sons Mowat and Ross. Next he provided as follows: "I also will Mowat and Ross, when they become 25 years of age, four thousand dollars each." He then devised to his son Hugh certain real property and the use of the homestead farm from his death, Hugh to pay \$100 a year to the testator's wife. After making provision for certain other small benefits to be received by his wife out of the homestead farm and devising and bequeathing other portions of his estate to some of his sons and daughters he willed that the balance of his estate, if any, after all claims were paid, was to be divided equally among his heirs. He also gave a number of annuities and finally willed to his son Hugh the use of his stock and implements for 10 years.

He made no express provision for the maintenance of his sons Mowat and Ross during their minority. The will is dated the 5th of September, 1899, and the testator died the following

day. His sons Mowat and Ross were then in the seventh year of their age, having been born on December 29th, 1892.

His will was proved by the London & Western Trust Co. (Limited), the executors named therein. On March 16th, 1901, the mother of the infants Mowat and Ross applied to Lount, J., and obtained from him an order authorizing the payment to her by the executors out of the income to be derived from the legacies of \$4,000 each, the sums of \$100 each per annum to be applied towards their support and maintenance.

As the result of proceedings subsequently taken for the purpose of ascertaining and adjusting the rights of the persons entitled to benefits under the will, the Master at London made his report, dated December 9th, 1903.

The report finds that the executors have in hand belonging to the infants Mowat and Ross, as their present share of the residue of the estate, the sum of \$2,000.

It further states that it is not necessary or proper for the executors to set apart for payment of the legacies of \$4,000 each payable to Mowat and Ross, the sum of \$8,000, inasmuch as these legacies are contingent on the infants attaining 25 years of age, and that the proper amount to be set apart will be the sum of \$4,442.16 which invested at 4 per cent. and compounded yearly until the infants attain their majority will produce \$8,000.

These findings and the directions given consequent thereon determined in effect that neither for the purposes of maintenance, nor otherwise, do the legacies of \$4,000 carry interest until the day named for payment.

On appeal Street, J., held that the legacies carried interest from the testator's death for the purposes of maintenance and he varied the report in this and other respects as stated in his order. Against this there is an appeal on behalf of the plaintiff, supported by others interested in the residuary estate.

As I have already pointed out there is no express provision for the maintenance of the two infants during their minority. But the appellants contend that the other devises and bequests in favour of the infants contained in the will are a sufficient provision for their maintenance.

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The well-settled rule is that when a legacy is given to a minor by a parent or by a person *in loco parentis* payable at a future period, if no other provision is made for maintenance interest will be allowed for that purpose even though by the terms of the will the legacy is contingent on the legatee living to the period which is mentioned for payment of the legacy.

In *Haughton v. Harrison*, 2 Atk. 329, Lord Hardwicke stated the rule, "If a legacy be left upon no condition but to be paid at the age of 21, and not given over, it is a legacy vested and transmissible; but still no interest can be demanded unless in the case of a child, who had no other maintenance or provision, for a parent is bound by nature to support a child."

Again he stated it in *Heath v. Perry* (1744), 3 Atk. 101, and in *Hearle v. Greenbank*, 3 Atk. 695, at p. 717. In the latter case he observe, "But in all these cases the ground the Court goes on is giving interest by way of maintenance." And in that case he held that inasmuch as the testatrix had allotted maintenance for her daughter from the general funds of her personal estate there could be no allowance of interest on a contingent legacy to the daughter.

So in *Wynch v. Wynch* (1788), 1 Cox 433, Lord Kenyon, M.R., said, "It is very clear that when a father gives a legacy to a child, whether it be a vested legacy, or not, it will carry interest from the death of the testator, as a maintenance for the child; but this will be only where no other fund is provided for such maintenance; for it is equally clear, that where other funds are provided for the maintenance, then if the legacy be payable at a future day, it shall not carry interest, until the day of payment, comes, as in the case of a legacy to a perfect stranger."

Nearly 90 years later the rule and exceptions were compendiously stated by James, L.J., in *In re George*, 5 Ch. D. 837. He said (p. 843), "But the rule of law is well established that a contingent legacy does not carry interest while it is in suspense, except in the case of a legacy by a parent or one standing *in loco parentis* to the legatee; and that exception is subject to another exception, that the rule giving interest to the child does not take effect when the testator has provided another fund for his maintenance, so that the income of the legacy is supposed not to be required for the purpose."

In *Binkley v. Binkley*, 15 Gr. 649, Spragge, V.C., said (p. 650), "It is clear law, and it is undisputed, that a legacy by a parent to an infant child, payable upon coming of age, or upon that event or marriage, the will being silent as to interest upon the legacy, stands upon a different footing from a legacy to a stranger; the latter not carrying interest; while in the case of a legacy to a child, the child is entitled to maintenance to the extent, if necessary of interest upon the legacy—this as a general rule—it is otherwise when other provision is made by the will for the maintenance of the infant."

To the same effect, Mowat, V.C., in *Spark v. Perrin*, 17 Gr. 519, and Proudfoot, V.C., in *Rees v. Fraser*, 26 Gr. 233.

In the very recent case *In re Bowlby*, *Bowlby v. Bowlby* [1904], 2 Ch. 685, the question to what extent is a child, to whom a legacy payable *in futuro* or contingent is given, entitled to the interest which the legacy bears or carries—whether to the whole interest as such or only to so much as may be necessary for maintenance—was fully discussed in argument and considered by the Court of Appeal. Although Vaughan Williams, L.J., argued strongly that the effect of giving interest at all was to entitle the infant to the whole, the conclusion of the Court was that, by the practice of the Court, the infant is only allowed so much as is necessary for maintenance, thus affirming the view expressed by Spragge, V.C., in *Binkley v. Binkley*, *supra*, that a child is entitled to maintenance to the extent, if necessary, of the interest upon the legacy.

I think that is the correct rule where the will makes no other provision or provides no other fund for the maintenance of the infant legatee.

But where there is in the will an express provision for maintenance from some other source, and the amount is specified, the legacy will not bear interest for the purposes of maintenance even though the provision made should be deemed insufficient for the purpose. This is upon the principle that as interest is allowed in other cases because it will not be assumed that the father intended no maintenance, there is no ground for the assumption where a provision is made.

So that where the amount of maintenance is specified that is in general the limit: Simpson on Infants, 2nd ed., 304.

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Where there is a general provision for maintenance and no amount specified there seems to be no absolute bar to recourse, if necessary, to interest upon the contingent legacy. Much less should there be where there is no express provision of any kind. The amount of the allowance in such cases must be governed by a consideration of the other circumstances, and a due regard to such other sources or funds as may be properly resorted to for maintenance.

Although in the present case it may be surmised that in making the provisions and arrangements in his will with reference to the payment to his widow by his son Hugh of \$100 a year for the use of the homestead farm for 10 years until the infants should have possession, and in giving the other benefits to his widow out of the same farm the testator was intending to provide for the infants' maintenance by their mother until they could maintain themselves on the farm, he has not given expression to that intention.

Upon the construction of the will I think there is no provision for maintenance out of the farm. The gift of an immediate share in the residue indicates a fund or source from which maintenance is derivable, but not in such form as to preclude recourse for maintenance to the interest upon the legacies. But in my opinion it should be taken into consideration in dealing with the allowance to be made for maintenance out of the interest of the legacies. I think, therefore, that the Master was wrong in determining that no part of the interest on the legacies could be devoted to the maintenance of the infants. I think that to the extent necessary for their maintenance, having regard to their shares of the residue, and the income derivable therefrom, they are entitled to have recourse to interest on their legacies, but only to that extent. It follows that the order of Lount, J., was proper at the time it was made, and that the whole sum of \$8,000 must be set apart to provide maintenance if necessary.

The order of Street, J., in this case does not in terms give to the infants the whole interest upon the legacies. The amount allowed by Lount, J., is continued, subject to being increased or reduced by a Judge. But that sum was manifestly arrived at without reference to the income from the infants'

shares in the residue, and the question of the proper amount to be allowed, having regard to such shares and the time when they were ascertained, should be now settled by the Master unless otherwise agreed upon.

It is said that the decision of Kekewich, J., in *In re Moody, Woodroffe v. Moody*, [1895] 1 Ch. 101, shews that the infants' interests in the residue is not to be taken into account. But I do not think so. The learned Judge was dealing with the argument that the gift of a share in the residue without any provision for maintenance, was a bar to a claim for maintenance out of contingent legacies. He excluded the 43rd sec. of the Conveyancing Act, 1881, Imp. 44-45 Vict. ch. 41, and treated the gift of a share in the residue as not subject to any provision for maintenance, and so treating it he held that it was not a bar to maintenance out of the income of the legacies. But he did not consider, and apparently was not called upon to consider, the question whether in fixing the maintenance, the infants' rights in the residue were to be taken into consideration. And in the light of the discussion in *In re Bowlby, Bowlby v. Bowlby, supra*, his declaration that the infants were entitled to interest *qua* interest would probably only apply to the circumstances of that case.

I think that subject to any variation that may be needed in accordance with what I have stated, the order of Street, J., should be affirmed, but under the circumstances the costs of the appeal should be borne by the estate.

MACLAREN and GARROW, JJ.A., concurred.

OSLER, J.A.:—I am of opinion that the appeal should be dismissed.

The testator's will contains no express provision for the maintenance of the two infant children. The residuary clause was plainly not intended to be a maintenance clause and cannot be read as such: *In re Moody, Woodroffe v. Moody*, [1895] 1 Ch. 101; *In re George*, L.R. 5 Ch. 837, 843; *Wynch v. Wynch*, 1 Cox 433; and *Donovan v. Needham* (1846), 9 Beav. 164, shew that there must be an express provision in the will for maintenance out of other property in order to rebut the presumption that the legacies to these children are to bear

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interest for the purpose of maintenance. In *In re Bowlby, Bowlby v. Bowlby*, [1904] 2 Ch. 685, this is treated as the well-settled law. The point there decided was that the surplus income, not applied for maintenance, did not become the property of the infant absolutely, where the legacy was settled in trust for the infant for life, but formed an accretion to the capital. But the question whether the infant was entitled to maintenance out of the interest even where the legacy was contingent, in the absence of an express provision having been made for it out of some other fund, appears to have been regarded as no longer debatable in view of the long-settled law and practice of the Court. It would therefore follow that the whole amount of the legacies should be set aside by the executors, and not merely a sum which by investment and accretion of the interest would produce a sum sufficient to answer them when they should become payable.

These cases fully support the judgment of Street, J., which should therefore be affirmed on both points.

MACLENNAN, J.A.:—This is an appeal by the plaintiff in a proceeding for the administration of the estate of one Hugh McIntyre, deceased.

The testator died possessed of a very considerable estate, consisting of farms and personal property. He left a widow and a large family, of whom two were twin children, Mowat and Ross McIntyre, who were at the date of the testator's death on September 5th, 1899, of the age of seven years.

By his will he gave his homestead to his son Hugh for ten years, subject to a payment of \$100 a year to his widow. Subject to that he gave his homestead to the infants Mowat and Ross absolutely. He also gave them four thousand dollars each when they respectively attained the age of twenty-five years, and he directed the residue of his estate, after paying all claims, consisting of his debts and funeral expenses, and numerous other legacies, to be divided equally among his heirs.

The will contains no express provision or direction for the maintenance of the said infant children.

By an order made by Street, J., on appeal from the Master's report, it was ordered that the sum of \$8,000

should be retained and set apart by the executors to provide for the payment of \$4,000 to each of the said infants if and when they respectively arrive at the age of 25 years, and that there should be paid out of the interest or income to accrue therefrom a sum of \$200 annually, or such greater or less sum as might be necessary for their maintenance until they respectively attained the age of 21 years, and that the surplus of such interest should fall into the residue.

The Master had directed that two sums of \$2,221.08 should be invested at 4 per cent. per annum to provide for each of the legacies of \$4,000, if and when the infants respectively should attain their ages of 25 years. And on the assumption that the infants were not entitled to maintenance the Master disallowed \$200 of a sum of \$550 which had been paid by the executors for that purpose before the making of his report.

This appeal is from the order of Street, J., by the plaintiff, in which he is supported by some of the other beneficiaries.

They contend that the Master was right in setting apart the smaller sums to answer the two legacies of \$4,000 each, and in finding that the infants were not entitled to maintenance out of the interest upon their legacies.

I think the judgment right in ordering the full amount of the legacies to be set apart, and that there is no ground for doing otherwise.

I, also, agree in the conclusion as to maintenance. That question has lately been discussed very elaborately by the Court of Appeal in a case of *In re Bowlby, Bowlby v. Bowlby*, [1904] 2 Ch. 685, reported since the case was before Street, J. I think that case makes it clear that these infants are entitled to maintenance until they attain full age out of the interest of their respective legacies from the death of the testator, without reference to their respective shares of the residue, and also without reference to the farm which has been devised to them. The case also determines that the surplus of interest beyond what is required for maintenance does not belong to the infants, and is not to be added to the capital of the legacies but is to fall into the general residue of the estate.

The appeal should be dismissed, costs of all parties out of the estate.

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Criminal Law—Circulating Obscene Paper—"Knowingly"—Evidence of Knowledge—Code, sec. 179.

The prisoner, who distributed and circulated a printed paper containing statements set out in the report, was indicted in a County Judge's Criminal Court, under sec. 179 (a) of the Criminal Code, 55 & 56 Vict., ch. 29 (D.), for unlawfully, knowingly, and without lawful justification or excuse distributing and circulating certain obscene printed matter tending to corrupt morals, contained in said paper bearing the title, "To the Public," "The Evil Exposed," "The Plot against Prince Michael Revealed." The county Judge found the offence proved as charged and reserved the following points for the opinion of the Court of Appeal—(1) Is the printed matter complained of obscene within the meaning of sec. 179 (a) of the Criminal Code; (2) Did the prisoner without lawful justification or excuse distribute or circulate such obscene printed matter?—

Held, that the word "obscene," is used in sec. 179, in the sense of conduct involving sexual immorality and indecency—offensive to modesty or decency—expressing or suggesting unchaste or lustful ideas, and that there were certain references and allusions in the paper which warranted the county Judge in concluding that it was a document of obscenity within the meaning of the section.

Held, also, that the use of the word "knowingly" in the section made it incumbent on the prosecution to give some evidence of knowledge and that here there was sufficient evidence to justify the county Judge's finding that the accused was aware of the contents of the paper.

Judgment of the county court of Essex affirmed.

THIS was a case reserved by the county Judge of the county of Essex for the opinion of the Court of Appeal under the provisions of sec. 743 of the Criminal Code, 55 & 56 Vict., ch. 29 (D.) as follows:

"Lodema Beaver, who has been committed for trial to the common gaol of the county of Essex and is now in custody therein stands charged before Charles Robert Horne, Esquire, county court Judge of the said county at Sandwich, this 27th day of February, 1904, (she having consented to be tried by this court without a jury) for that, the said Lodema Beaver at the city of Windsor, in the county of Essex, on the 24th day of December, 1903, unlawfully, knowingly and without lawful justification or excuse, did distribute and circulate certain obscene printed matter tending to corrupt morals contained in a printed paper bearing the heading 'To the Public.' 'The evil exposed.' 'The plot against Prince Michael revealed.' The said obscene matter being as follows:

"These are but a few of the more prominent men who are made public examples of. Among other minor cases, there was Mr. McKay of the Windsor Record, who broke his ankle by slipping on a banana peeling—clearly symbolizing the filth he declared we were practising.

"The Mayor of Windsor is dealing with no mortal man, but with him who sitteth on the White Horse, whose eyes are as a flame of fire and who leads the armies of heaven, being the King of Kings and Lord of Lords. And the remnant were slain with the sword of him who sat on the horse, which sword proceedeth out of his mouth and all the fowls were filled with their flesh.

"FACTS ABOUT THE DRAKE.

"The New Eve Success having been attacked with the sword of ridicule we feel that a few facts about the Drake, that a webb-footed, unclean bird, will be of interest to our readers, and as it is written 'Answer a fool according to his folly,' we believe we are justified in pointing out these interesting facts to show how perfectly God is fulfilling His Word and the devil is playing his part with his instruments.

"Drake has a threefold meaning. In the first place, it means Dragon fulfilling that prophecy in Rev. xii where the great dragon—that old serpent the devil and satan—rises up against Michael and his angels and comes against the woman (verse 12), for it is well known that drakes can do up the hens, but they have no power over the roosters, and they have the reputation of being the most licentious fowl of the barnyard. And the prophecy goes on to say, 'to the woman were given two wings of a great Eagle' and is she not now in ambush, under the protection of the wings of the American Eagle fighting the dragon who is persecuting her with a flood of lies.

"Second. Then the drake means male duck, the terror of all female birds, a perfect symbol of the evil powers, which are likened unto fowls of the air and of which it is written, concerning the time of the end when 'evil shall be put out and deceit shall be quenched,' the fowls (or evils spirits) shall take their flight away together. Ducks and drakes are notorious scavengers of filth and are perfectly at home in the foulest of water. Thirdly. Drake means 'wild oats,' and our readers

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are well aware of the significance of this term, suffice to say that no sowing of tares is permitted in Israel, for we are commanded to subdue the wild oats and replenish the good old corn of the land.

"Israel has no use for this three-horned monster; as a fowl, it is condemned as unclean, as seed, it is forbidden to be sewn, and as the dragon, that old serpent the devil and satan, it is clearly revealed to be the inveterate foe of Michael; and an enemy of all righteousness who prevaieth not; neither was his place found any more in heaven, and it shall be found no more upon earth, he hath but a short time; his 'little season is nearly over.'

" A WARNING.

"To whom it may concern.

"That all take warning, before they do anything in opposition to the Flying Roll, or New Eve Success, from the terrible doom which befell Ex-Chief of Police Starkweather. Let me call your attention to his downward career and ultimate unnatural and strange death. Even the world's newspapers have remarked the strange coincidence, that both he and his sister should share the same terrible fate, but there is good reason for this, to those who know something of God's justice.

"Starkweather's downfall commenced from the day he bore false witness against Prince Michael at Ann Arbor in 1892. He was desirous to make his mark at the opening of his career as Chief of Police, but it proved a sorry day for him and from that moment God's curse was upon him, and he was doomed to sink, and according to the judgment then passed upon him 'die not like other men but pine away,' which he did, having died of anaemia or blood turning to water, and actually starving to death in sight of food. The curse upon him manifested itself in bodily affliction, which soon necessitated his resignation from office, and since then he has sunk gradually down, down to the dark portals of the grave, the curse of God resting upon him, which shall be the dread portion of all, and that more speedily than heretofore, who oppose in any manner, shape or form the Flying Roll—the word of the living God—God's last message to men. It matters not who; the God of Israel is no respecter of persons, and all who have stood in the

way of the march of Israel's hosts from Governor Pingree down to Mary McClean, an irresponsible woman, who came from Scotland to murder Prince Michael's lieutenant, have gone down to the dust beneath their feet.

"It is written that the enemies of this Flying Roll shall not die like other men, but meet strange deaths. Pingree was not permitted to die at home, but in a strange country under painful circumstances. Mary McClean was killed by a Grosse Point electric car, while prepared to carry out her murderous threat. D. L. Moody was smitten while preaching in Kansas City, shortly after disowning and ridiculing me, his former associate and student, for my belief in the Flying Roll.

"And it was no 'strange coincidence' to those who take notice of God's dealing with me, for Starkweather's sister to die of the same terrible affliction, for she was accessory with him to do up Prince Michael, and make a name for himself. She murderously tortured innocent and virtuous girls, who were held prisoners until some would consent to lie against Michael, and she had these poor defenceless young girls examined with instruments, until they were badly bruised and received internal injuries, in order to make them appear to the medical doctors as girls who had been debauched by Prince Michael. Hell never produced such a one as this arch-fiendess of the bottomless pit, and thank God they are both damned there, body and soul—and may one and all who still oppose his word—the Flying Roll, quickly follow them, until there is not a smell of them left on the planet and God's word fulfilled. For publishing the revolting and disgusting facts of this foul crime committed upon my wife I was sent to prison, on the charge of selling obscene literature, tending to contaminate morals, etc.

"Her description of the brutal manner in which she was debauched by instruments in the police station of Woodbridge Street was the article the Crown Attorney secured my conviction upon.

"Where was the crime? An act is not a crime unless done with criminal intent according to law. Was the diabolical invention to use instruments on virtuous girls and make them appear otherwise not the most dastardly of crimes, done with the most determined criminal intent? How could any man keep

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quiet in the face of such an outrage on his wife? No never, and justice is not satisfied at their damnation, but one and all who have fought God in the Flying Roll are accessories with them, and they shall share a like fate.

"What we publish is for the public good; that is our intent, to benefit our fellow men, that all wickedness may be overthrown and truth prevail against vice. Therefore take warning and be careful how you act. We wish everyone well or we wouldn't warn you thus.

"In 1892, when persecution arose because of the Flying Roll, which testifies against all immorality, and the believers in this message were falsely villified; and the vilest lies published day after day and ever since to this time, representing them as immoral persons, practising all manner of wickedness, the most disgusting and obscene descriptions of these lying inventions being freely circulated throughout this city and all over the country; why was no voice raised against this immoral and obscene literature and steps taken to suppress it?

"The publishers of these papers then claimed to be exposing the evil for the public good, which the law allows. Granting this to be so, is it justice to interfere with the New Eve, who is exposing the immoral conduct of the true evil doers, who blame Michael for what they themselves were guilty of in order to escape the hand of justice?

"Let the newspaper publishers produce their papers published at the time of Michael's trial, then let him that is without sin among you cast the first stone—charging the publication of obscene and immoral literature.

"For the vindication of God's word, 'the Flying Roll,' and all who believe in it.

"The publishers of the 'Flying Roll' and 'New Eve Success.'

"Per

"DAVID LIVINGSTONE MCKAY."

The case was argued on the 24th of November, 1904, before MOSS, C.J.O., OSLER, MACLENNAN, GARROW and MACLAREN, JJ.A.

J. W. Hanna, for the prisoner, contended that even if the words were filthy, they did not tend to immorality or to corrupt

morals, and were not "obscene" within the meaning of sec. 179, of the Code, and that, the evidence did not prove that the prisoner circulated the paper "knowingly" or that, she even knew how to read: he cited Crankshaw's Criminal Code, p. 163, *Emmens v. Pottle* (1885), 16 Q.B.D. 354; *Vizetelly v. Mudies Select Library, Ltd.*, [1900] 2 Q.B. 170.

John R. Cartwright, K.C., Deputy Attorney-General, *contra*, contended, that the words in themselves were lewd and tended to corrupt morals, and that the evidence of what the prisoner said when she was arrested and asked what she was doing, "that she was fighting the devil," showed she knew the contents of the paper and its hoped for effect, and that the distribution was deliberate, and cited *The Queen v. Hicklin* (1868), L.R. 3 Q.B. 360 at p. 371.

January 25. OSLER, J.A.:—The prisoner was indicted under sec. 179 (a) of the Code for unlawfully, knowingly and without lawful justification or excuse, distributing and circulating certain obscene printed matter, tending to corrupt morals contained in a printed paper, bearing the title "To the Public"; "The evil exposed"; "The Plot against Prince Michael revealed:" the said obscene matter, being the following: [setting forth the contents of the paper at length]. The Judge found the offence proved as charged and reserved the following points for the opinion of the Court of Appeal.

1. Is the printed matter complained of obscene within the meaning of sec. 179 of the Criminal Code?

2. Did the prisoner knowingly without lawful justification or excuse distribute or circulate such obscene printed matter?

The second point involves only the question of the prisoner's knowledge of the nature of the printed pamphlet she was found to have distributed, and I think there was some evidence of that in her own statement made at the time, sufficient to justify the finding of the learned Judge.

As to the first point, I have had more doubt.

Sec. 179 of the Act is not aimed at merely libellous publications, nor at those couched in merely coarse, vulgar and offensive language. The word "obscene" has a great variety of meanings, but its meaning in this section is to be ascertained

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from the company in which it is found. The section is one of a group forming part XIII. of the Code, which is headed "Offences against morality." With the exceptions mentioned in sec. 177 (a), the doing of any indecent act in a public place; 179 (b) publicly exhibiting any disgusting object; and sec. 180 (c) transmitting by post any letter or circular concerning schemes devised or intended to deceive the public, or for the purpose of obtaining money under false pretences, this part of the Code strikes at conduct involving sexual immorality and indecency, and it is, in that sense in my opinion, that the word is used in sec. 179. One class of meanings given to it in the Oxford Dictionary, as contrasted with others, "somewhat archaic," and latinisms is "(2) Offensive to modesty or decency: expressing or suggesting unchaste or lustful ideas, impure, indecent, lewd."

It is within this class that the word, as here used, falls.

In *United States v. Wales* (1892), 51 Fed. Rep. 41, the question was very much considered and many authorities are cited. It was held, to quote the head-note, that Revised Statute, sec. 3893, punishing the mailing of any "obscene, lewd, or lascivious book," etc., applied only to matters, tending to excite impure and unchaste thoughts, and not to language, which was merely coarse, vulgar, and indecent.

The whole of the printed matter set forth on the record, disgusting as it is, is suggestive, rather of the disconnected ravings of a lunatic, than of anything tending to corrupt morals, but there are one or two wretched punning allusions to the name of some person, which may be said to have warranted the learned county Judge in concluding that it had or might have such a tendency, and therefore, that it was a "document of obscenity" within the meaning of the section.

I would therefore affirm the conviction.

MACLAREN, J.A.:—The first question, to be decided, is, whether the printed matter distributed by the defendant was obscene within the meaning of sec. 179 of the Criminal Code.

The word was originally used to describe anything disgusting, repulsive, filthy, or foul. This use of the word is now said to be somewhat archaic or poetic; and it is ordinarily

restricted to something offensive to modesty or decency, or expressing or suggesting unchaste or lustful ideas, or being impure, indecent, or lewd.

There can be no doubt, that the greater part of the sheet in question would fall rather within the first definition given above; being composed in the main of unintelligible jargon respecting Prince Michael and the Flying Roll, and the judgments that fell upon prominent men on account of their hostility to him, and foul abuse of officials in Detroit and Windsor who appear to have been connected with his prosecution.

Some of the references, however, to the chief of police of Detroit, and to the Mayor of Windsor would clearly appear to fall rather within the latter of the above definitions.

It is further necessary under the Code that it should tend to corrupt public morals.

There can be no doubt that the language complained of is so foul and disgusting that it would prove repulsive to most persons reading it, and is so gross that there would be no danger of its corrupting their morals. But unfortunately there are others susceptible to lustful ideas upon whom it would have precisely the opposite effect.

I think the true rule is that laid down by Cockburn, C.J., in *The Queen v. Hicklin*, L.R. 3 Q.B. 360, at p. 371, where he says: "The test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."

With regard to the second point reserved, it was urged on behalf of the defendant, that it was not proved that she knew of the contents of the document she was distributing, and that consequently it was not done "knowingly." This brings up the question, whether the onus of proof on this point was on the prosecution or the defence. In my opinion, the insertion of the word "knowingly" in the place where it is found makes it incumbent on the prosecution to give some evidence of knowledge.

A like use of the word "knowingly" in the English Licensing Act, 1872, was held by Day, J., in *Sherras v. De*

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Rutzen, [1895] 1 Q.B. 918, at p. 921, to shift the burden of proof from the defence to the prosecution. See also *Bank of New South Wales v. Piper*, [1897] A.C. 383, at p. 389, and *Mullins v. Collins* (1874), L.R. 9 Q.B. 292.

I am of opinion, that there was sufficient evidence in the present case to justify the county court Judge in finding as he did, that the accused was aware of the contents of the sheet. She was an intelligent woman of mature years, and was a member of the sect known as "The Flying Rollers" or "Disciples of Prince Michael," and when asked what she was distributing, replied, that she was fighting the devil, thus, shewing that she was aware of the contents of the document, as that idea appears in it in a number of places. Her position was quite different from that of a newsboy selling papers on the street, as he is ordinarily ignorant of the contents, save in the case of some sensational news.

I am consequently of opinion, that an affirmative answer must be given to both questions reserved for this Court, and that the appeal should be dismissed.

MOSS, C.J.O., MACLENNAN and GARROW, JJ.A., concurred.

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[IN THE COURT OF APPEAL.]

SMART v. DANA.

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Sheriff—Bond—Condition on Appointment to Office—Resignation of Office—Re-Appointment—Subsequent Breaches—Liability for.

Plaintiff resigned his office of sheriff and defendant was appointed in his place under a commission containing a condition that he should pay plaintiff "out of the revenues of the said office" a certain sum for his life; and he gave a bond to the plaintiff for the due fulfilment of the condition. Finding that the revenues were not sufficient to pay the amount, defendant resigned his office and soon afterwards was re-appointed under a commission without any such condition.

In an action on the bond, the plaintiff obtained judgment for the amount of the penal sum, and damages were assessed for the breaches up to the time of the defendant's resignation.

A petition was subsequently presented by the plaintiff, asking for assessment of damages for alleged breaches since the re-appointment and for execution. On the trial of an issue as to whether the plaintiff was entitled to execution for any further damages:—

Held, that want of good faith was not to be imputed to the Crown who had the right to permit, and did permit, defendant's resignation and by accepting it made it effectual, and thereby discharged the condition and all further liability on the bond; that the condition was attached to the first commission and the annuity was payable only during the occupancy of the office thereunder, and when that commission was gone there ceased to be any contract to pay it.

Seemle, that there was no implied obligation on the defendant's part to refrain from invoking the consideration of the Crown to relieve him from the obligation it had imposed upon him.

Held, also, that the question was not *res judicata* by the principal judgment, and that the judgment upon the issue was appealable as a final judgment as to matters set up as a defence to further liability in respect of alleged breaches subsequent to the new appointment.

Judgment of Falconbridge, C.J.K.B., reversed.

THIS was an appeal from a judgment of Falconbridge, C.J.K.B. in an issue tried at Ottawa on the 16th January, 1904, in which he held that the plaintiff was entitled to judgment on the issue with costs.

Judgment had been recovered by the plaintiff for the amount of the penalty in a bond in the action *Smart v. Dana* (1903), 5 O.L.R. 451. Damages had been assessed up to the date of the issue of the writ and had been paid.

Subsequently the plaintiff presented a petition to the Court praying an assessment of damages for alleged breaches of the bond accruing after the issue of the writ, and for leave to issue execution for the amount of such damages when assessed.

On that petition an issue was directed between the plaintiff and defendants herein, and the question to be tried was, whether

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the plaintiff was entitled to have execution on the judgment for any further damages and, if so, in what amount in respect of the subsequent breaches. On the trial of that issue, the plaintiff was held entitled to judgment.

From this judgment the defendant appealed to the Court of Appeal; and the appeal was argued on the 21st November, 1904, before MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, J.J.A.

Shepley, K.C., for the plaintiff, objected that the judgment on the issue was interlocutory and not final and that no appeal lay.

Aylesworth, K.C., for the appeal. The appointment of Dana was during the pleasure of the Crown, and the imposition of the condition for the payment to the plaintiff out of the revenues of the office was a condition by the Crown, which would have been unlawful, if not mentioned in the commission to Dana, R.S.O. 1897, ch. 328. The resignation of Dana put an end to the obligation. The acceptance of the resignation by the Crown was a release of the condition imposed by the Crown. The new commission without any condition does not revive the old one. There was no evidence that the resignation and new appointment was a scheme to get rid of the condition. The resignation, acceptance and new appointment was a cancellation of the first appointment.

Shepley, K.C., and *J. A. Ritchie*, contra. The claim here is *res adjudicata* by the judgment, 5 O.L.R. 451. There was a freedom to contract here under sec. 5 of the Act, R.S.O. 1897, ch. 328, and the contract made is binding. The bargain and the bond were the contract. The commission to Dana was at the pleasure of the Crown, and there was no power in him to resign. The pleasure should not be exercised or procured by Dana while he was under a liability: as he had contracted to pay during plaintiff's lifetime, he should not be allowed by his own act to shorten the time and relieve himself of his obligation properly incurred. We refer to *Day v. Singleton*, [1899] 2 Ch. 320 at p. 327; *McIntyre v. Belcher* (1863), 14 C.B.N.S. 654; *Telegraph Despatch and Intelligence Co. v. McLean* (1873), L.R. 8 Ch. 658; *In re English & Scottish Marine Ins. Co., Ex p.*

Maclure (1870), L.R. 5 Ch. 737; *In re Railway and Electric Appliances Co.* (1888), 38 Ch. D. 597 at p. 603; *Brown & Co. v. Brown* (1876), 35 L.T.N.S. 54 at p. 57; *Ogdens, Ltd. v. Nelson*, [1904] 2 K.B. 410.

Aylesworth, in reply, referred to *Stuart v. McVicar* (1898), 18 P.R. 250.

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January 23. The judgment of the Court was delivered by OSLER, J.A.:—The case was, that shortly before the 1st November, 1898, the plaintiff resigned the office of sheriff of the united counties of Leeds and Grenville, which he had held for many years, and on that day the defendant Dana was by commission under the great seal of the Province appointed to the said office “in the room and stead of James Smart, Esquire, resigned.” The tenure of the office was as usual during pleasure, but the grant was made subject to a condition in favour of Smart, set forth in the commission, together with the reasons for imposing the same, as required by the 49 Geo. III. ch. 126, sec. 11 (Imp.), as follows:—“Subject to the condition that you the said George Augustus Dana shall during your occupancy of the said office, commencing on the 1st of November, 1898, pay to the said James Smart out of the revenues of the said office so long as he said James Smart shall live at the rate of \$1,200 per annum, payable monthly, such monthly payments to be made on the 15th days of each month at the Court House of the town of Brockville, the said James Smart having held the said office for many years, and owing to the infirmities of old age, coupled with disabilities from an accident, being no longer able to personally discharge the duties of the same.”

On the 28th January, 1899, the defendant entered into a bond in the penal sum of \$10,000, reciting the commission and the condition in favour of Smart therein set forth; and the condition of the obligation was declared to be “that if the said George Augustus Dana fully complies with the terms of the said above recited condition, during the times and in the manner therein mentioned, then this obligation shall be void.”

On the 18th March, 1902, Dana finding that the net “fees, perquisites and profits,” of the office after paying the necessary disbursements for carrying it on did not amount to

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the stipulated amount, and being unable to effect any compromise or arrangement with the plaintiff, tendered his resignation of the office, assigning this reason therefor. His resignation was accepted by the Crown, but on the 24th April, 1902, he was again appointed to the office, and the new commission, under which he now holds it, is not subject to any condition in favour of the plaintiff.

On the 11th April, 1902, the plaintiff brought an action on the bond, in which he recovered judgment for the penalty, and damages were assessed up to the date of his resignation, the defendant being willing to account on that footing. What effect, if any, the resignation and new appointment might have as a discharge of the defendant from further liability was left to be determined when it should be attempted to assess damages in respect of alleged subsequent breaches of the condition.

On the 26th November, 1903, the plaintiff presented a petition in Court, setting forth the bond, the recovery of judgment thereon, the payment of the damages already assessed; the resignation by defendant of his office, which was alleged to be "for the purpose of avoiding any further liability under the said bond merely, and not with the intention of finally relinquishing his connection with the shrievalty of the said united counties;" and his subsequent re-appointment.

The petition then set forth, that Dana had since the 11th of April failed entirely to comply with the terms of the condition named in the said bond during the occupancy by him of the office of sheriff, in having entirely failed to pay out of the revenues of the office, while held by him, at the rate of \$1,200 in monthly payments, etc. The prayer of the petition was, that damages might be assessed for the breaches of the bond subsequent to the issue of the writ in the action.

On the hearing of the petition on the 23rd December, 1903, an order was made directing the trial of an issue between the parties, in which the question to be tried should be, whether the plaintiff was entitled to have execution upon the said judgment for any further damages, and if so, to what amount, in respect of subsequent breaches.

Falconbridge, C.J., gave judgment for the plaintiff, holding it to be quite clear that the defendant could not by his resignation

and subsequent re-appointment escape liability. That if he could do so, after discovering from three years' experience, that he had made an improvident bargain, he might equally have done so a day or a week after he was first appointed, which was a *reductio ad absurdum*.

Upon the evidence, it must be taken, (although in an action upon the bond or a proceeding arising out of it, the fact seems not to be material), that the defendant Dana's resignation was made in good faith, that is to say, that it was absolute and unqualified, and not upon any understanding express or implied, that, if accepted he should be re-appointed to office.

Want of good faith is not to be imputed to the Crown, who undoubtedly had the right to permit and who did permit the resignation, and who by accepting it made it effectual. The office thereby became vacant, and a few weeks afterwards, without any solicitation on the defendant's part it was again granted to him, as a mere act of grace and favour, by a new commission free from the condition in the former commission. This, with all due respect, was, in my opinion, an entire discharge of the defendants from further liability upon their bond.

Regard must be had to the peculiar nature of the contract. Apart from the consent of the Crown, authorizing payment of an annuity out of the fees of the office, testified in the commission itself, such a contract would be illegal, as being contrary to the 5 & 6 Edw. VI., ch. 16, and 49 Geo. III., ch. 126 (Imp.); *Regina v. Mercer* (1859), 17 U.C.R. 602; *Regina v. Moodie* (1861), 20 U.C.R. 389, and by the very terms of the commission and of the obligation referring to and reciting it, the annuity was payable out of the fees of the office held under the particular commission of the 1st November, 1898. It was attached to that commission and was payable only during the occupancy of the office thereunder, and when the commission was gone the obligation of the bond came to an end. The office is now held under the new commission, and the former, which alone gave any force to the defendants' obligation, has *ipso facto* been revoked or discharged.

Whether an action would have lain against the defendant Dana, for procuring or inducing the Crown to cancel the first

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commission, or to accept his resignation, it is not necessary to determine. I do not suggest that it would.

The office was not one from which the defendant could have discharged himself by his own act. So long as he held it under the earlier commission, he was bound to pay the annuity to the extent to which the fees perquisites and profits received thereunder, would have enabled him to do so, but I doubt if there was any implied obligation on his part to refrain from invoking the consideration of the Crown to relieve him from the condition it had imposed upon him. By his own act alone he could not disable himself from complying with it, but if the Crown should think it right, under all the circumstances of the case, to relieve him either by accepting his resignation or dismissing him, I do not at present see why that should not be effectually done. For these reasons, the principle of such cases as *McIntyre v. Belcher*, 14 C.B.N.S. 654; *Ogdens, Ltd. v. Nelson*, [1904] 2 K.B. 410 (a); *Day v. Singleton*, [1899] 2 Ch. 320 is inapplicable, the liability having been put an end to, or the defence to any further claim upon the bond having arisen, by the act of the Crown, not the act of the defendant. See also *Stirling v. Maitland* (1864), 5 B. & S. 840; *Bovine Ltd. v. Dent and Wilkinson* (1904), 21 Times L.R. 82; *Re Bradford Tramways and Omnibus Co., Ltd.—Courtenay's case* (1904), 68 J.P. 362.

It was contended that the question was *res judicata* by the principal judgment, but I do not think so.

The defence is one, which arose after that judgment was recovered, and was in no way involved in the decision. It is as much open to the defendant now, as a release or discharge of that judgment would have been. I am also of opinion, that the judgment on the trial of the issue is appealable as a final judgment upon the matters set up as a defence to any further liability to damages, in respect of alleged breaches of condition occurring subsequent to the new appointment.

I think the appeal should be allowed and the petition dismissed.

(a) Affirmed by the House of Lords, 21 Times L.R. 359.—Rep.

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[IN THE COURT OF APPEAL.]

GRATTAN V. OTTAWA SEPARATE SCHOOL TRUSTEES.

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Separate Schools—Christian Brothers—Teachers.

The general policy declared by later statutory enactments is to require teachers of separate schools to undergo the same examinations and receive the same certificates as common school teachers exempting those persons from its immediate operation, who hold certificates granted by trustees under C.S. U.C. ch. 65, sec. 28.

The word "persons" in sec. 36 of ch. 294 R.S.O. 1897, is to be read as "individuals," and where, as in that enactment, there is found in unambiguous language a general declaration as to the qualification required, any restriction upon that declaration should not be extended beyond what the language construed in the ordinary and natural meaning of the words and in the light of the context clearly requires.

Judgment of MACMAHON, J., 8 O.L.R. 135, affirmed.

THIS was an appeal by the defendants from the judgment of MACMAHON, J., reported, 8 O.L.R. 135, which was argued on the 10th and 11th October, 1904, before MOSS, C.J.O., OSLER, MACLENNAN, GARROW and MACLAREN, J.J.A.

The argument was directed principally to the question as to whether the Brothers of the Christian Schools, as such, were qualified to teach in the separate schools of the Province of Ontario as mentioned in the judgment of the Chief Justice.

Shepley, K.C., for the appeal, traced the history of the legislation on the subject from 47 Geo. III. ch. 6 (U.C.); referring to and commenting on 56 Geo. III. ch. 38, secs. 3 and 4; 60 Geo. III. ch. 7; 4 Geo. IV. ch. 8; 4 & 5 Vict. ch. 18, sec. 7; 9 Vict. ch. 20; 9 Vict. ch. 27; 10 & 11 Vict. ch. 19, sec. 5, sub-sec. 3; 12 Vict. ch. 50; 12 Vict. ch. 83; 13 & 14 Vict. ch. 48, sec. 19, sec. 24, sub-sec. 4; 16 Vict. ch. 185, sec. 4; 18 Vict. ch. 131; C.S.U.C. ch. 64, secs. 80, 107, 119; C.S.U.C. ch. 65, sec. 28; C.S.L.C. ch. 15, sec. 110, clause 10, par. 5, and contended that the status of the Christian Brothers at the time of Confederation was that as a body they had a clear teaching qualification. Then the 93rd section of the British North America Act forbids Provincial Legislatures from passing any law, which prejudicially affects "any right or privilege with respect to denominational schools, which any class of persons have by law in the Province at the union." At the union, the body had by law, as a body,

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the "right or privilege" of teaching in "denominational schools" within the Province of Ontario. If the subsequent Provincial legislation purports to "prejudicially affect" that "right or privilege" it is *ultra vires*. But it should upon the principle "*ut res magis valeat quam pereat*" be construed so as not to so "prejudicially affect" such "right or privilege" if such construction is consistent with its language, and it is so consistent. The construction by the learned Judge of sec. 62 of 49 Vict. ch. 46 (O.) is, therefore, too narrow. He referred to *Board of Trustees of the Roman Catholic Separate Schools of Belleville v. Grainger* (1878), 25 Gr. 570; *City of Winnipeg v. Barrett*, [1892] A.C. 445; *Brophy v. The Attorney-General of Manitoba*, [1895] A.C. 202, *per* Lord Herschell, at p. 213 *et seq.*

Geo. F. Henderson, for the plaintiff, *contra*. The plaintiff claims to be entitled to an injunction, not only on the question of the non-qualification of the Brothers, but on objections that the trustees have no power to enter into an agreement to provide a residence, water, fuel, light, etc.: they cannot delegate their powers of discretion and cannot hire a bulk number of teachers, but must employ the individuals and settle their duties and compensation: *Re Kiely* (1887), 13 O.R. 451 at p. 457; *Regina v. Webster* (1888), 16 O.R. 187; Dillon's Municipal Corporations, 4th ed., par. 96; Lewin on Trusts, 10th ed., 271. The plaintiff, however, joins in asking this Court to pass upon the question raised by the appeal, appreciating its importance and the desirability of its proper determination. The question in dispute here must be decided on the construction of sec. 62 of 49 Vict. ch. 46 (O.) where the exact wording of the present section appears for the first time, and the proper construction of the exception is, that it is in favour of those individuals who at the time of Confederation were qualified by reason of being members of the order, and who, if still alive, may be still qualified, or perhaps rather exempt from the necessity of qualification; but the Brothers as a body or community are not qualified. A saving clause does not create an affirmative right: Hardcastle's Statute Law, 3rd ed., p. 227. Taking the several statutes referred to by the other side *seriatim*, it will be seen that they are in no way inconsistent with this construction, but the contrary, especially the Act of 1863, which

purports to "restore rights" to Roman Catholics and to harmonize the provisions of the Separate School and Public School Acts.

D. O'Connell, for the Attorney-General of Ontario. The first statute was 4 & 5 Vict. ch. 18—the only Act dealing with education for both Upper and Lower Canada. 7 Vict. ch. 29, sec. 71 applied to Upper Canada only and repealed 4 & 5 Vict. ch. 18, which gave the right to the Brothers to teach in the separate schools. If they are now qualified it must be by some other statute than 4 & 5 Vict. ch. 18: *Hardcastle's Statute Law*, 3rd ed. 374. 7 Vict. ch. 29 establishes separate schools in the Province of Upper Canada: secs. 55 and 56; and 9 Vict. ch. 27 in Lower Canadian schools. There was a board of examiners. By 12 Vict. ch. 83, secs. 54 and 63 there was a board of examiners in Upper Canada the same as in Lower Canada. By 12 Vict. ch. 83, sec. 81, 7 Vict. ch. 29 was repealed and no provision was made for the minority having teachers of their own. 13 & 14 Vict. ch. 48, sec. 19 restored separate schools. 14 & 15 Vict. ch. 111 gives the right to have separate schools in each ward. 16 Vict. ch. 209, sec. 1 recites that all teachers are required to be examined in Lower Canada. 16 Vict. ch. 185, sec. 4 provides that trustees may qualify teachers by certificate, and sec. 20 continues certificates previously granted. 18 Vict. ch. 131 is the first separate Act for separate schools. By sec. 11 trustees may qualify teachers. C.S.U.C. ch. 65, sec. 28 re-enacts 18 Vict. ch. 131, sec. 11. By 26 Vict. ch. 5, sec. 13 separate school teachers are subject to the same examinations as common school teachers, but those who are "qualified by law" are excepted. There were two classes—one qualified by examination, and one by the statute, and all are qualified *by law*—that is, by the law of Ontario. 37 Vict. ch. 27, sec. 27, sub-sec. 22 (O.) provides for examination of teachers by the Council of Education. 40 Vict. ch. 16, sec. 1, sub-sec. 5 (O.) amends 37 Vict. ch. 27 (O.), see also R.S.O. 1877, ch. 206, sec. 30. R.S.O. 1877, ch. 204, secs. 203, 204 makes provision for the qualification of public school teachers who had previously passed examinations.

Shepley, in reply.

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November 14. The judgment of the Court was delivered by Moss, C.J.O.:—The plaintiff, a ratepayer and supporter of separate schools in the city of Ottawa, brought this action to restrain the defendants from entering into a proposed contract with the Brothers of the Christian schools for the direction and supplying of teachers for a boys' separate school for the parish of Notre Dame, and from constructing a school building such as proposed in the contract or for carrying the contract into effect.

A motion was made for an interim injunction, which came on to be heard before MACMAHON, J., and was by consent turned into a motion for judgment in the action.

The learned Judge gave judgment in favour of the plaintiff and adjudged that the defendants be restrained from constructing a school building such as proposed and from carrying into effect the provisions of the contract.

An abstract of the learned Judge's opinion is printed in the appeal book, but the full text is to be found in 8 O.L.R. 135 (1904).

The defendants appealed, limiting their appeal, however, to the question of their right to employ the Brothers of the Christian schools as teachers in the Roman Catholic separate schools in the city of Ottawa. As the learned Judge's opinion that the defendants are not authorized or permitted to engage any of these persons, who has not passed the examinations and does not hold the certificate of qualification, prescribed by sec. 78 of the Public Schools Act, R.S.O. 1897, ch. 292 was only one of several grounds, upon which the contract was adjudged invalid; and as the other grounds appear, and indeed are conceded to be, quite sufficient to sustain the formal judgment, the present appeal seems to be directed against one of the reasons rather than against the judgment itself.

And it might suffice for the disposition of the appeal to hold that the judgment should be affirmed upon grounds not attacked by the defendants. Upon the broad ground that the defendants are not authorized to engage with any person or body of persons in a contract such as proposed and that its whole scope is beyond the powers of the defendants, as well as upon the grounds referred to by the learned Judge, and leaving aside the question of the engagement of the Brothers of the Christian schools, the

contract is invalid and the defendants were rightly enjoined as directed by the judgment.

But all parties joined in expressing a wish for an expression of opinion upon the question of the right of the defendants to employ as teachers in their schools Brothers of the Christian schools who have not passed the examinations and do not hold the certificates of qualification referred to.

On behalf of the defendants it is urged that the learned Judge put an erroneous construction upon sec. 36 of the Separate Schools Act, R.S.O. 1897, ch. 294. This enactment had its genesis in sec. 13 of 26 Vict. ch. 5. It next appeared with a variation in sec. 30 of ch. 206 of the Revised Statutes of Ontario 1877, and was first enacted in its present form as sec. 62 of 49 Vict. ch. 46 (O.).

At the time of the passing of the 26 Vict. ch. 5 the provision with regard to teachers' qualifications was sec. 28 of C.S.U.C. ch. 65, by which it was enacted that a majority of the trustees of separate schools in townships or villages or of the board of trustees in towns or villages should have power to grant certificates of qualification to teachers of separate schools under their management.

A review of the earlier legislation, though interesting as shewing the anxious solicitude of the early Legislatures for the dissemination of knowledge and the promotion of education, throws little light on the question under consideration. And in the end that question must be determined upon the proper construction to be placed upon the words of the section as it now appears.

The general policy declared by the later enactments was to require that teachers of separate schools should undergo the same examinations and receive the same certificates as common school teachers. But it was thought proper to exempt some persons from its immediate operation. Evidently the persons aimed at in this Province were individuals holding certificates granted by trustees under the Consolidated Statute, and authorized to teach or engaged in teaching by virtue thereof. The word "persons" is to be read as "individuals" and as applying to individuals thus qualified by law as teachers. On ordinary principles of construction the word ought if possible to be given

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the same meaning when applied to persons in the Province of Quebec. And there is nothing in the words of the Act pointing to a different or more extended meaning in regard to that Province. On the contrary, the language seems intended to confine the meaning to individuals. As it now reads it is "*the persons*," i.e., the individuals, specifically denoted by the use of the definite article. The period of their existence is limited and circumscribed. Not all persons qualified by law as teachers, but the individuals so qualified at the time of the passing of the British North America Act, are to be considered qualified for the purposes of the Act. It is no doubt the case that when the 26 Vict. ch. 5 was passed there were persons falling within the description in the proviso of the 50th sec. of 9 Vict., ch. 27 (which was applicable only to the Province of Lower Canada) engaged in teaching in this Province, but there was nothing in the law preventing them from accepting certificates of qualification from trustees acting under sec. 28 of the Consolidated Statute. And possibly without such a certificate they could not engage in teaching in this Province, though an examination might not be a necessary preliminary to its grant. Thus they would become qualified by law as teachers either in Upper or Lower Canada.

The Legislature in 1886 and again in 1887 and 1897 recognized, and perhaps not without reason, that not improbably there were still surviving some individuals, who were within the category of persons qualified as teachers under the law as it existed at the time of the passing of the British North America Act, and for their benefit carried forward the saving clause. And where, as in this enactment, there is found in unambiguous language a general declaration as to the qualification required, any restriction upon that declaration should not be extended beyond what the language construed in the ordinary and natural meaning of the words, and in the light of the context, clearly calls for.

Thus treating the section in question it does not appear that the learned Judge has come to an erroneous conclusion.

There must be judgment dismissing the appeal with costs.

G. A. B.

[IN THE COURT OF APPEAL.]

THE LONDON STREET RAILWAY COMPANY

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THE CORPORATION OF THE CITY OF LONDON.

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Street Railway — By-Laws — Mayor's Signature — Resolution — By-Laws as to Routes and Speed — Ratio of Track Mileage to Increased Population — Newly Acquired Territory — 59 Vict. ch. 105 (O.)

The defendants passed a resolution authorizing certain extensions and changing some of the routes of the plaintiffs' railway, and the plaintiffs, relying upon a by-law being passed later to carry out the resolution, performed certain work and incurred expense. The by-law was subsequently passed, read a first, second and third time at one meeting of the defendants, signed by the clerk, sealed with the municipal seal, but not signed by the mayor.

In an action to compel the mayor to sign it and the defendants to accept an agreement to carry it out:—

Held, that the company took the risk of a by-law being passed and that they were not misled; and that without the mayor's signature it was incomplete and invalid.

Held, also, that two by-laws, set out in the judgment of McMahon, J., as to the routes and speed of the plaintiffs' cars were, under the circumstances, valid as being within the defendants' power and authority under 59 Vict. ch. 105 (O), which validated a by-law of the defendants and an agreement between plaintiffs and defendants under which the plaintiffs built and operated their railway.

By the original by-law, under which the road was authorized to be built and operated, as set out in the judgment of McMahon, J., the defendants were bound to establish new lines, as might be directed by by-law of defendants, in the proportion of one mile of track to every 2,000 inhabitants of the city then existing or thereafter extended, the population to be ascertained as mentioned in the by-law, and that in the event of any local municipality being annexed, the railways of the company within the annexed municipality, and the company in relation thereto should have all the rights and be subject to the terms of the by-law. A local municipality was annexed to the defendants' municipality in 1898, and at the time of annexation had a street railway trackage of 5,900 feet. The population of the city in 1901 was 39,183, being an increase of 4,183, and the proportion of additional trackage to population was 11,043 feet. By a subsequent by-law defendants were directed to construct 7,380 feet of additional track:—

Held, MacLennan, J. A., dissenting, that under the original by-law the mileage of the local municipality must be added to the mileage of the lines in the city at the time of the annexation, and the amount deducted from the amount required by the last mentioned by-law, which was consequently bad as being in excess of the mileage the defendants could require.

THIS was an appeal from a judgment of MacMahon, J.

The London Street Railway Company were incorporated by a special Act of the Ontario Legislature, 36 Vict. ch. 99, and were operating their railway in the city of London under the terms of city by-law No. 916, dated 21st May, 1895, and an agreement made pursuant to that by-law, dated 6th June, 1895, both of which are set out in and validated by 59 Vict. ch. 105 (O.).

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The action was brought in respect to four by-laws of the defendants: (1) To compel the mayor to sign by-law No. 2083, and declare it a valid by-law, and to compel the defendants to accept an agreement from the company to fulfil its terms, and (2) To declare invalid three certain other by-laws Nos. 2099, 2100, and 2101.

The facts are set out in the judgments.

The action was tried at London on the 18th and 19th of December, 1902, before MacMahon, J., without a jury.

I. F. Hellmuth, K.C., and *C. H. Ivey*, for the plaintiffs.

T. G. Meredith, K.C., and *G. E. Taylor*, for the defendants.

January 22, 1903. MACMAHON, J.:—The plaintiffs claim is to have it declared that by-laws numbered 2099, 2100, 2101, passed by the council of the city of London on the 21st July, 1902, are invalid, and for an injunction restraining the defendants from enforcing any of said by-laws.

Also for a mandamus to compel the mayor of the city to sign and execute by-law 2083 passed on the 23rd June, 1902.

This by-law was passed in accordance with a resolution of the council of the 29th April, 1902, authorizing the street railway company—

(a) To extend its tracks on South street, from Wellington street to Adelaide street, thence north on Adelaide street to Layard street, thence east on Layard street to Mamelon street, thence north on Mamelon street to connect with track on Hamilton road.

(b) To extend track on Hamilton road from Rectory street to Egerton street.

(c) To widen Richmond street, between Huron and Regent streets, both on the east and west sides, and kerb, grade and gravel it to the width the city engineer may direct, and allow track to remain in its present location.

(d) Provided, the street railway company consent to make above extensions and repairs, that for the purpose of shorter route for return trip from Springbank, they be permitted to lay tracks on Beaconsfield avenue and Wortley road, to connect with street railway track on Stanley street, on condition that

they open out Beaconsfield avenue to the Wharnccliffe road fifty feet wide, and that all lots required to open out said street are deeded over to the city gratis; they to grade and gravel and kerb the whole of said Beaconsfield avenue and Wortley road and portions of other streets on which these new tracks are to be laid, and also under drain same to the satisfaction of the city engineer and No. 2 committee; also lay a cement crossing on south side of Beaconsfield avenue at Wortley road, and on west side of Wortley road at Beaconsfield avenue, both to the approval of said city engineer and No. 2 committee; also put the approach to Mr. Yeo's property on Wortley road in condition satisfactory to Mr. Yeo and city engineer and indemnify city against any loss for damages by reason of the construction of said tracks. Further, that South London cars be kept in operation through South London till last car is back from Springbank. This extension of track not to be considered an extension under by-law 916.

(e) The company's representatives accepted the propositions assuming the population of city to be 40,000, and that a faster service than ten minutes was not required for the South street and Hamilton Road Belt Line, and that they were to be permitted to abandon the Rectory street line, from Hamilton road to Campbell street."

"That the city solicitor be instructed to prepare an agreement in accordance with the above."

Immediately upon the passing of this resolution by the council, the railway company proceeded with the work of grading Beaconsfield avenue and Wortley road, and put up poles and finished and completed the tracks and had the cars running thereon on the 27th June.

The company also on the passing of the resolution, and before the 23rd June, removed six lengths of rails from the Rectory street line and put them down on Wortley road and discontinued altogether the service on the Rectory street line.

A. O. Graydon, the city engineer, said he had no authority from the council to give grades for the railway on Beaconsfield avenue and Wortley road, and when Mr. Carr, the manager of the railway company, asked for a plan for the extension of the railway, and wanted grades given on Beaconsfield avenue and

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Wortley road, he told Carr the railway company had no authority to be there, as there was no by-law. To this Carr replied he knew that, but the by-law would pass and it would be all right.

The London street railway company were empowered to build and operate an electric system of railways in London under by-law numbered 916, passed by the council of the city on the 21st May, 1895; and under an agreement (which is made subject to the conditions and regulations of the by-law) entered into between the corporation of the city of London and the street railway company, dated the 6th of June, 1895, which were validated and confirmed in 1896 by an Act of the Legislature, 59 Vict. ch. 105 (O.).

Section 35 of by-law 916 provides that :

"No new line or extension or additional track shall be built by the company on any of the streets of the said city of London, except under authority first obtained by by-law of the council of the corporation."

The mayor, on the 23rd June, 1902, caused a special meeting of the council to be summoned to consider the street railway by-law, 2083, at which meeting the by-law as amended was (under the emergency clause of the city's by-laws) read a first, second and third time. The by-law was carried by a vote of six "yeas" to five "nays," alderman Pritchard voting with the "yeas."

Counsel for the city urged that the by-law was not duly passed because John H. Pritchard had been declared entitled to succeed to the office of alderman, and had taken the declaration of office and had voted as a member of the council before a majority of the members of the council present had consented to the acceptance of the resignation of alderman Beatty being received.

At that meeting, on the 23rd June, the mayor announced that alderman Beatty had placed in his hands his resignation as a member of the council. The resignation was then read and filed.

The city clerk thereupon stated that in accordance with the statute of 1901 Mr. John H. Pritchard, being next in succession

to the office, had taken the necessary declarations of qualification and of office.

On the minutes of the council and immediately after above statement of the city clerk appears the following:—

“Alderman Campbell, seconded by Alderman Winnett, moved that this council hereby place on record its high appreciation of the services rendered by Alderman Beatty to his fellow citizens while a member of this council, and that upon the occasion of his resignation as such member we now wish to convey to him our sincere desire for his future welfare and happiness.”

“Carried by standing vote of the members.”

This is, I consider, a sufficient compliance with the requirements of sec. 210 of the Municipal Act, R.S.O. 1897, ch. 223, which provides that “Any mayor or other member of the council may, with the consent of the majority of the members present, to be entered upon the minutes of the council, resign his seat in the council.”

The resolution refers to alderman Beatty as having been a member of the council, of his having resigned his seat, and it is carried without a division. This is an ample consent by the council to the resignation. See Biggar’s Municipal Manual, 228.

The city was, during part of the months of June and July, building a sewer on Rectory street, which prevented the company from running their cars along that street; but early in July the mayor had a conference with Mr. Carr, the manager of the company, regarding resuming the service on that street. And on the 5th July, the mayor wrote Mr. Carr, saying: “In accordance with the understanding you had with me regarding the running of cars on the Rectory street line, I will expect the resumption of traffic by Wednesday or Thursday of next week (the 9th or 10th inst.), by which time the sewer now in course of construction will be completed, so as to enable you to replace tracks and give your regular service on that line.”

Mr. Carr replied to this on the same day, saying he did not understand to what the mayor referred in his letter. That a special committee was appointed to deal with the matters in difference between the street railway company and the city, the report of which committee had been submitted to him

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(Carr), which he accepted, and that the report had been approved of by resolution of the city council with instructions to the city solicitor to prepare a by-law in accordance therewith. That the company were ready and willing to carry out their part of the arrangement as agreed upon, and expected the city to do the same.

At a meeting of the council on the 7th July, the mayor stated his reasons for not signing the by-law, and read the letter of the 5th July from the manager of the street railway company. A select committee was, on motion, appointed to confer with the street railway company in the matter.

The select committee, at a meeting of the council held on the 14th July, reported that at the conferences held with the street railway authorities, they took the ground that the city was bound to carry out the terms of the by-law, but suggested a compromise, one term of which was, that in the event of the company continuing to operate the Rectory street line, provision should be made for payment by the city of the watchman where Rectory street crosses the Grand Trunk Railway.

The committee did not recommend that this arrangement be adopted by the council.

The motion for the adoption of the report was carried.

At a meeting of the council on the 21st July, a motion for the second reading of the by-law was defeated by eight "Nays" to one "Yea."

The by-law not having been signed by the mayor, it was competent for the council to reverse the prior vote by which the by-law had been read a third time and passed.

On the 23rd June, after the by-law had been read a third time, the manager obtained a copy thereof and submitted it to the company's counsel, and on the following day he took it to Cleveland to get the consent of Mr. Everett, the president of the company. It was never submitted to or assented to by the board of directors, although individual members of the board had been consulted by the manager. The twelfth clause of the by-law provides:

"12. This by-law and the powers and privileges hereby granted shall not take effect or be binding upon the corporation, unless and until formally accepted by the company within four

weeks after the passing of this by-law, by an agreement which shall legally bind the company to perform, observe and comply with all the agreements, obligations, terms and conditions herein contained; and shall stipulate and legally bind the company that nothing in this by-law contained shall prejudice or affect the rights of the corporation under the said by-law No. 916, and the agreement between the company and the corporation dated the 6th day of June, A.D. 1895, except as varied by this by-law, and that, save as varied by this by-law, the said by-law and agreement shall be and remain valid and binding upon the company, their successors and assigns."

The company's manager was aware of the existence of this clause in the by-law, and that a similar clause was inserted in a previous by-law (No. 1968) between the city and the street railway company, passed on the 28th May, for extending the line of railway on Railroad street.

By the terms of sec. 35 of by-law 961, the railway company could not build a new line or extension or additional track unless under a by-law of the council. The by-law not having been signed by the mayor, who was the presiding officer at the meeting at which it was passed, the by-law was inoperative: R.S.O. 1897, ch. 223, sec 333; *The Canada Atlantic Railway Co. v. The Corporation of the City of Ottawa* (1886), 12 S.C.R. 365 at p. 379; *Wigle v. Village of Kingsville* (1897), 28 O.R. 378.

Until a by-law was passed and formally accepted by the company by an agreement which would bind the company to perform its terms and conditions, the company was acting without authority in building a line of railway and running cars thereon.

The plaintiffs are not entitled to the mandatory order asked for to compel the mayor to sign the by-law.

Mr. Hellmuth moved (in the event of the mandamus asked for in the statement of claim not being granted) for leave to amend the statement of claim so as to claim in the alternative a mandamus compelling the council to pass a by-law in accordance with the resolution of the council passed on the 29th of April, 1902.

What was urged was that as the council had passed the

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resolution providing for the building by the company of the new lines, and as the company had proceeded with and built some of the lines in accordance with the resolution and with the sanction of the city engineer, who furnished the grades for the lines on Beaconsfield avenue and Wortley road, the corporation was, by its officer assenting to the lines on those streets being built, bound by his acts.

The city engineer could not bind the corporation by giving the grades, and he stated to Mr. Carr that he had no authority from the council to furnish the grades. The manager of the company obtained the grades from the engineer and proceeded with the building of the lines, taking his chances of the resolution being ratified by by-law.

The amendment asked for should not be allowed, as, even if allowed, upon the facts the plaintiffs are not entitled to the mandamus asked for.

On the 5th December, 1898, the council passed a resolution changing and varying the then existing routes on the lines and branches of the railway, which change came into effect on the 12th December. And the city engineer having determined the speed and service, at which cars should run on the different routes as changed and varied, the city council on the same day (5th December) passed a resolution (in which the direction of the city engineer is set out) ordering and directing the street railway company to run their cars in accordance therewith.

Copies of these resolutions were sent by the city clerk to the railway company on the 6th December, 1898, and the railway company ran their cars in accordance with such resolution until January, 1899. The city engineer, on the 18th January, 1899, reported to the chairman of No. 2 committee that—"Owing to the numerous times the Grand Trunk Railway, Canadian Pacific Railway and Lake Erie & Detroit River Railway have to be crossed in routes 5 and 6, I do not think a regular service can be operated by the present schedule, as cars get 'bunched' by the delays at these points."

At the meeting of the council held on the 6th March, 1899, a report of No. 2 committee was presented, the 24th clause being adopted by the council which "recommended the adoption

of the time-table by the street railway company which had been approved by the city engineer."

By-law No. 2099, to change or vary the routes for the running of the cars on the street railway, was passed by a vote of two-thirds of all the members of the council present, on the 21st July, 1902, to come into effect on the 31st of the same month. The routes are numbered consecutively from one to six, and the course to be taken by the cars running over the streets embraced in each route is defined. Route No. 5 requires that the cars should run easterly along Horton street to Hamilton road to Rectory street, thence northerly along Rectory street to Dundas street, etc.

By-law No. 2100 was passed to regulate the speed and service of the cars on the various routes.

By-law No. 916, sec. 25, sub-sec. (s) provides that "The speed and service necessary on each main line, part of same or branch shall be determined from time to time and may be altered, changed or varied by the order of the said engineer, approved by the council of the corporation, and all cars shall be run at such intervals as the said engineer, with the approval of the council of the corporation, may from time to time determine. And the council of the corporation may from time to time, as they may see fit, by a vote of two-thirds of all the members of the council of the corporation change or vary any route or routes adopted or changed from time to time by the company, and the company shall thereafter run their cars according to the route or routes so changed or varied by the council of the corporation for at least six consecutive months, and the company shall not make any change in any route more often than twice in any year. The company shall furnish the council of the corporation with a written statement of the routes first adopted by the company within six months from the passing of this by-law, and each and every change in such routes shall immediately after such change be notified in writing by the company to the council of the corporation."

Before the passing of by-law No. 2100 by the council, an order and direction of the city engineer as to speed and service of the cars was read and adopted by the council.

The direction as to speed and service adopted is almost

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identical with that which existed on the railway in 1898. The number of the cars running was, however, increased in 1902.

Both by-laws, numbered 2099 and 2100, were upon motion read a first, second and third time and signed by the mayor and city clerk.

Section 50 of the city's by-law No. 773 provides that: "Every bill shall be introduced on motion for the first reading thereof, and shall receive three several readings, each on different days previous to its being passed, except on urgent and extraordinary occasions, when it may be read twice or thrice in one day."

In *Re Jones and City of London* (1899), 30 O.R. 583, where it was objected that the by-law should not have received the three readings in one day, the council's rules of proceeding so providing,—excepting in cases of urgency,—it was held that these were matters of internal regulation and subject to the decision of the mayor or chairman of the council, and the only appellate tribunal was the council.

The plaintiffs' contention is, that the council having in December, 1898, changed and varied the then existing routes, and the company having run their cars in accordance with the changes so made, the council was precluded from making a further change or variation in the routes, unless and until the company had changed the routes so fixed by the resolution of the council. But that cannot be the meaning of sub-sec. (s) of sec. 25. The company is required by that sub-section to furnish the council with a written statement of the routes first adopted by the company within six months from the passing of the by-law, and each and every change in such routes shall immediately after such change be notified in writing by the company to the council of the corporation.

There is no evidence shewing what routes were first adopted by the company. But the resolution of the 5th December, 1898, shews that it is a change or variation of the several previously existing routes used by the company. The company ran their cars as they were bound to do on the routes as changed and varied by the resolution for six consecutive months without making any change. The day after the six months had elapsed the company could change the whole of the routes, and the council might on a two-thirds vote immediately change or vary the routes so

changed by the company. If the routes changed and varied by the council are not changed by the company after the six months, then the company must be considered as having "adopted" such routes, and they may be again changed and varied by the council.

It was urged, that as the council had passed a resolution authorizing the abandonment by the company of the Rectory street service, and as it did not require a by-law for that purpose, the council could not include Rectory street in the by-law changing the routes and the by-law was for that reason bad on its face. The argument overlooks the fact that the resolution providing for the abandonment of the Rectory street line was contingent upon the building of other lines and branches by the railway company, which required a by-law to be passed before it would be binding on the city.

The council had, I consider, authority to pass by-law No. 2099, changing and varying the routes. If I am correct as to that, then the city engineer having determined (as he was empowered to do by sub-sec. (s) of sec. 25 of by-law No. 916) the speed and service necessary on the main line of the railway and its branches, which was approved by the council and embodied in by-law 2100, which I have found was passed by the council with all the formalities required by law, then that by-law is also valid.

Then as regards by-law No. 2101: by it the company is required to lay down a new line and extend the existing lines of railway, as set out therein, amounting to 7,380 feet of track.

Section 21 of by-law No. 916 provides that:

"The company shall establish and lay down new lines and extend the tracks and street car service on such streets or parts thereof as may from time to time be directed by the council of the corporation within such periods (not being earlier than one year from the passing of the by-law or by-laws respectively) as may from time to time be fixed by a by-law or by-laws passed by a vote of two-thirds of all the members of the council of the corporation, and all such extensions and new lines shall be regulated by the same terms and conditions as are in this by-law contained, and the right to operate the same shall terminate at the expiration of the term limited by this by-law

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with respect to the existing system. Provided that no such new line or extension shall render the proportion of additional track mileage to population more than one mile of track, exclusive of side tracks, switches, y's, loops, turntables and turn-outs, to every two thousand inhabitants of the city as now existing or hereafter extended, in excess of a population of 35,000, and the new line or extension shall be of single or double track, according as the portion of the track to which it is to be added or connected is single or double. Each mile of double track shall be reckoned as two miles of single track, but side tracks, switches, y's, loops, turntables and turn-outs shall not be included in any such reckoning, and for the purposes of this by-law, except where otherwise provided, the population, as ascertained by the last Dominion or municipal census, whichever shall be the latest, shall be deemed the actual population."

And sec. 53 provides that: "In the event of any local municipality or any part thereof being annexed to or amalgamated with the city of London at any time during the continuance of this by-law or any extension thereof as hereinbefore provided, the railway or railways belonging to the company now or hereafter constructed within the said local municipality, or such part thereof as may be annexed or amalgamated as aforesaid, and the working thereof and the company in relation thereto shall have all the rights conferred by and be subject to all the terms and conditions of this by-law, but nothing herein contained shall be deemed to authorize or shall authorize the corporation to take over that portion of the company's line to Springbank which shall lie west of the limits of the village of London West as now existing."

London West was annexed to the city of London in 1898 (see 61 Vic. ch. 46, sec. 1 (O.)). At the time of the annexation London West had a street railway service of 5,900 feet, leaving out y's, loops, turn-outs, etc.

According to the municipal census of 1901, London had a population of 39,183. The increase in population was therefore 4,183. The proportion of additional trackage to population according to sec. 21, would therefore be 11,043 feet. Now, under sec. 53, where a local municipality is amalgamated with

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the city the railways connected with such municipality and belonging to the company “shall have all the rights conferred by and be subject to all the terms and conditions of this by-law.” That is: The railways existing in the local municipality at the time of the amalgamation become subject to by-law No. 916, and form a part of the city’s railway system. The mileage of it must therefore be added to the mileage of the lines in the city just as the population of the local municipality is on amalgamation added to that of the city.

Mr. Meredith, counsel for the city, admitted that if the track mileage in London West is to be treated as additional track mileage, the city, under secs. 21 and 53 of by-law 916, is not entitled to all the tracks mentioned in by-law No. 2101.

It is, I consider, beyond question that the mileage of the line in London West must be treated as additional track mileage to the city, and the position would therefore be :

The additional track mileage in proportion to the increased population would be..	11,043 feet.
Deduct track mileage brought in by London West	5,940 “
Track mileage to credit of city	<u>5,103 “</u>
The mileage under by-law 2101 demanded by the city is	7,380 feet.
The amount of increased mileage to which the city is entitled is	<u>5,103 “</u>
Excess of mileage demanded by by-law No. 2101	<u>2,277 “</u>

The company under this by-law would not know where to begin or where to end the increased mileage to which the city is entitled. The by-law is therefore clearly bad.

There will be judgment for the plaintiffs declaring that by-law No. 2101 is invalid.

And there will be judgment for the defendants declaring that by-laws numbered 2099 and 2100 are valid and subsisting by-laws, and the defendants are entitled to a mandatory order asked for in their counter-claim compelling the plaintiffs to run their cars in accordance with the provisions of said by-laws;

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and also to compel the company immediately to replace the tracks and works illegally removed from Rectory street. And also to an injunction perpetually restraining the company from running their cars on Beaconsfield avenue and Wortley road, and to a mandatory order compelling the company to remove their tracks and works from the said streets.

The plaintiffs are entitled to so much of the costs of the action as relate to by-law 2101; and the defendants will be entitled to the costs of the action except those relating to by-law 2101.

The plaintiffs and defendants both appealed in so far as the judgment was against them, and the appeals were argued on the 13th and 14th October, 1903, before Moss, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A.

Hellmuth, K.C., and *C. H. Ivey*, for the plaintiffs, contended that the mayor should be directed to sign by-law 2083 which had been read three times at one meeting of the council as a case of urgency, and had been signed by the clerk of the council, and the municipal seal affixed; that the resolution upon which it was based was regular in all respects, and the company, relying upon the by-law being passed, performed a great deal of work and incurred considerable expense, and it was too late for the city to withdraw; that if by-law 2083 was held valid, by-laws Nos. 2099 and 2100 would be invalid because it would be impossible to comply with them, and even if valid, the Court would not undertake the supervision of their being properly carried out; and that the track mileage of the newly acquired territory should be taken into consideration, in deciding how much increased track mileage the defendants were entitled to, but in any event the Dominion census governed, and they had had demanded too much by by-law 2101. They referred to *Re Jones & City of London*, 30 O.R. 583; *Wheatley v. Westminster Brymbo Coal Co.* (1869), L.R. 9 Eq. 538, at p. 552; *Garrett on Nuisances*, 2nd ed. 375, 376; *Kerr on Injunctions*, 3rd ed. 44; *Birmingham Canal Co. v. Lloyd* (1812), 8 Ves. 575; *The Corporation of the Township of Pembroke v. The Canada Central*

R.W. Co. (1882), 3 O.R. 503, at 509; *Wicks v. Hunt* (1859), Johnston 372.

T. G. Meredith, K.C., and *G. E. Taylor*, for the defendants, contended that by-law 2083 was not complete or binding until signed by the mayor under sec. 333 of the Municipal Act: that by-laws 2099 and 2100 were both within the powers of the city under the by-law and agreement set out in 59 Vict. ch. 105 (O.), and that there was no provision anywhere that the track mileage of the newly acquired territory should be taken into consideration, in estimating the track mileage the city were entitled to, and that consequently by-law 2101 was within their rights, and cited *Canada Atlantic R.W. Co. v. City of Ottawa*, 12 S.C.R. 365, at p. 379; *Re Allan v. Town of Napanee* (1902), 1 O.W.R. 634; *Toronto Public Library Board v. City of Toronto* (1900), 19 P.R. 329.

Hellmuth, in reply.

January 25, 1904. Moss, C.J.O.—The facts of this case and the various contentions of the parties are fully stated in the opinions of the learned trial judge and my brother Maclellan.

The learned trial Judge found that the by-law 2083, alleged by the plaintiffs to have been passed by the defendants council on the 23rd of June, 1902, was never passed, and that the plaintiffs were not authorized to remove their tracks from Rectory street or to lay down tracks on Beaconsfield avenue and Wortley road. He also determined that by-laws 2099 and 2100 were valid, and that the plaintiffs were bound by them. But he held that by-law 2101 was invalid because it required the plaintiffs to lay down or construct extensions in excess of the mileage they were obliged to lay down or construct under the agreement.

The formal judgment issued in pursuance of this decision declared by-law 2101 invalid and void, and by-laws 2099 and 2100 valid and subsisting, ordered the plaintiffs to conform to and comply with the requirements of the same so long as they are operative, ordered the plaintiffs to replace the tracks on Rectory street and remove the tracks from Beaconsfield avenue and Wortley road, and dismissed the action so far as it related to the alleged by-law of the 23rd of June, 1902.

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Both parties appealed from the judgment; the plaintiffs contending that they were entitled to all the relief claimed in the action; the defendants on the other hand submitting that by-law 2101 should have been held valid.

For the plaintiffs it was argued, and for present purposes it may be conceded, that if the by-law of June 23rd, 1902, was a valid by-law binding upon the defendants, or if it was now adjudged that it should be signed and executed by the mayor and clerk so as to render it binding, the by-laws 2099 and 2100 would be invalid as improperly and unduly interfering with the routes and services of the cars as affected by the alleged by-law.

But upon the evidence there never was such a by-law as that alleged and relied upon by the plaintiffs. No doubt the plaintiffs believed that a by-law to the effect of permitting the removal of the tracks from Rectory street, and the construction of tracks on Beaconsfield avenue and Wortley road would be passed. But without waiting for it they proceeded with the work. A by-law was contemplated and intended as the plaintiffs well knew.

They were well aware that under their agreement a by-law was necessary, but they nevertheless proceeded instead of waiting for the action of the council. They did this in face of the warning of the city engineer, who, as found by the learned trial Judge, pointed out to the plaintiffs' manager, that he had no authority to go on with the work he was doing on Beaconsfield avenue and Wortley road, as there was no by-law. The plaintiffs' manager was satisfied that the by-law would be passed, and that "it would be all right," and took the risk.

Under these circumstances, the plaintiffs are not in a position to urge that the defendants are to be held bound as if a by-law was passed. And unfortunately for them they are unable to shew a by-law duly passed. The action of the council on the 23rd of June, 1902, with reference to the by-law, was open to serious question. The matter was not regularly before the council on that occasion, and the mayor was justified in the position he took in refusing to sign it, or to treat it as a by-law validly passed by the council. And when it came up again before a regularly constituted meeting of the council it was rejected. The action of the council in finally

negating it leaves nothing to which the mayor's signature could now be properly affixed.

The appeal as to this branch of the plaintiffs' case fails, and this virtually disposes of their appeal as to by-laws 2099 and 2100. Under the agreement between the parties, and the by-law 916 which forms part of the agreement, there is given to the defendants and their engineer the power to regulate speed and service from time to time, provided changes in any route are not made more than twice in any year. The two by-laws in question have been passed in accordance with by-law 916, and the only serious objection made to them was that they were impossible of performance if by-law 2083 was valid and existing.

The remaining question is as to the defendants' appeal with regard to by-law 2101.

The census governing at the time of the passing of this by-law was the Dominion census. The enumeration made by the assessment commissioner or the assessors under the Assessment Act was that directed by sec. 13 col. 20 of that Act, and was not what was intended by the parties when providing in sec. 21 of by-law 916 that the population as ascertained by the last Dominion or municipal census whichever shall be the latest shall be deemed the actual population. It is plain that they had reference to a municipal census taken under sec. 533 of the Municipal Act. And as I read the provisions of by-law 916 bearing on the question, the defendants are not entitled to require an extension of a fraction of a mile for every fraction of increase of population over 35,000. For each 2,000 additional inhabitants they may require an extension, a new line of a mile in length or less if they so decide. But it could not have been intended and I do not read the contract as providing, that upon every increase of a few hundreds in the population, the plaintiffs are liable to be called upon to incur the expense and trouble of laying down and operating additional tracks, the operation of which might lead to no return to them. I prefer to read it as limiting the right to a mile for each 2,000 of additional population.

In my opinion this appeal should be dismissed.

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There is no reason for now pronouncing an order against the plaintiffs, requiring them to conform to and comply with the requirements of by-laws 2099 and 2100. It is not alleged that they are refusing to do so except upon the ground of their invalidity. And it is not to be supposed that they will now decline to observe them. The formal judgment should therefore be varied so as to declare in paragraph 2 thereof, that the plaintiffs are bound to conform to and comply with the requirements of by-laws 2099 and 2100, and the 3rd paragraph should be struck out.

With these variations the appeal and cross-appeal should be dismissed with costs.

OSLER, J.A. :—I have had the advantage of reading the opinion prepared by my brother Maclellan, and agree with it so far as it affirms the judgment of MacMahon, J., and dismisses the plaintiffs' appeal in respect of by-laws 2099 and 2100, and their claim for a mandamus to compel the mayor to sign by-law 2083, said to have been passed by the council on the 23rd June, 1902.

The reasons given by my learned brothers for pronouncing and affirming the judgment at the trial in these particulars are to my mind entirely satisfactory.

I do not, however, agree that any mandatory order should have been made, compelling the company to run their cars in accordance with the provisions of by-laws 2099 and 2100. The time is not ripe for such an order.

The validity of the by-laws has been in question and in litigation from the time of their passage. Now, that their validity has been affirmed, it is not to be assumed that the railway company will decline to comply with them, and it will be time enough to determine what remedies are open to the municipality when they establish a case of disobedience.

As regards the cross-appeal of the city I am of opinion that this should also be dismissed. I agree in the result of the judgment at the trial holding that by-law 2101 is invalid.

The question is not free from difficulty, but I am of opinion that the proper construction of secs. 21; 35, and 53 of defendants' by-law 916 is that the city can demand the construction

of an extension of the line only in respect of each rise of 2,000 in the population over 35,000. They may demand less than a mile for the 2,000 but between that and 4,000, they can demand nothing.

It can have never been intended, nor do I think that the contract means, that for every 100 or 200 or more increase on the first 2,000, the city should be at liberty to demand the construction of so many feet of track. The factor of population was ascertained by the last Dominion census, a later municipal one not being proved, and according to this, the city demanded more than they were entitled to, and passed an invalid by-law.

I do not agree with the plaintiffs' contention, that when the population was raised by the absorption of the municipality of London West, the track mileage in that district was to be treated for the purposes of by-law 916 as an extension *quoad* the increased population.

It is the increase of the population of the city, no matter how its borders may have been enlarged, which gives the council the right under the present conditions to require the extension of the then existing track mileage, whatever that may be.

The appeal and cross-appeal should be dismissed with costs.

MACLENNAN, J.A.:—This action and appeal concern four by-laws, of the city of London, relating to the street railway, and the rights of the parties depend upon an Act of the Legislature, 59 Vict. ch. 105 (O.), entitled an Act respecting the London Street Railway Company, which validated a by-law of the city, passed on the 21st May, 1895, and an agreement made between the city and the railway company bearing date the 6th day of June, 1895.

The first of the by-laws in question is 2083, which purported to authorize the company at their request, to make certain extensions of their lines on the streets of the city, to be commenced and completed within a limited time after the passing of the by-law.

This by-law was read three times on the 23rd June, 1902, was signed by the clerk and sealed with the corporate seal, but

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was never signed by the mayor, as required by sec. 333 of the Municipal Act.

A resolution purporting to authorize the same works had been passed by the council on the 29th of April.

The mayor refused to sign the by-law, and on the 21st of July afterwards, a motion to pass the by-law again was voted down by a majority of eight to one.

Before the by-law had been brought up for its reading on the 23rd June, the company had, trusting to the certainty of a by-law being passed, incurred a good deal of expense and done a good deal of work towards the construction of the extensions purporting to be authorized by the resolution of the 29th of April.

The relief sought in respect of this by-law 2083 is, that the mayor may be compelled to sign it, and that the city may be compelled to accept from the company the agreement on their part to fulfil the terms of the by-law provided for in and by the 12th paragraph thereof.

The other by-laws in question are numbered respectively 2099, 2100, and 2101, and were duly passed by the council on the 21st July, 1902. The first prescribed the routes along which the cars of the company should be run on their tracks within the city. The second prescribed the speed and the intervals between cars to be observed by the company, and the third called for the construction of certain new lines, and the extension of certain of the existing lines within the city. These three by-laws were passed in the exercise by the city of powers and authority claimed to be conferred by the Act already mentioned, and the by-law and agreement thereby validated.

The relief sought by the company in respect of these three by-laws was a declaration that they were invalid, and an injunction to restrain their enforcement.

The learned Judge declared by-law 2101 to be invalid and void as calling for the construction of a greater mileage of new track than the city was entitled to. He also held by-law 2083 not to be binding on the city, and rejected the claim for relief of the company in respect thereof; and further ordered the restoration of the tracks to their original condition, in

which they were before action taken, pursuant to the resolution of the 29th April and the alleged by-law 2083. He also declared by-laws 2099 and 2100 to be valid, and ordered conformity thereto and compliance therewith by the company.

Both parties appealed so far as the judgment was adverse to them respectively.

I am of opinion that the judgment is wrong in holding that by-law 2101 is void, and that the appeal of the city with regard to that by-law should be allowed.

That by-law required the company to lay down certain new tracks, in certain streets of the city. The right to do this depends on by-law 916, of which secs. 21, 35, and 53, require to be considered. Section 35 provides that no new line or extension shall be built without the authority of a city by-law. Section 53 provides in substance that in the event of any extension of the city limits, any railway of the company within the annexed territory shall be subject to all the terms and conditions of by-law 916, with the exception of a portion of the line to Springbank, and sec. 21 authorizes the city to require new lines or extensions to be constructed, provided that such new line or extension shall not render the proportion of additional track mileage to population more than one mile of track to every 2,000 inhabitants of the city, as *now existing or hereafter extended*, in excess of a population of 35,000, and it is declared that the last Dominion or municipal census, whichever should have been the latest, should be deemed the actual population of the city.

After the passing of the original by-law 916, London West was annexed to the city, whereby the city population was largely increased, and by the terms of sec. 21 that increase required to be reckoned as part of the excess of the population over 35,000. At the time of the annexation London West contained a mile or thereabout of railway line belonging to the company, and which thereupon became by sec. 53 a part of the lines within the city limits, and subject to the terms and conditions of by-law 916.

The city now requires the construction of new lines, or the extension of existing lines, and sec. 21 is clear that the mileage of such new lines, or extension of existing lines, which may be

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required is in the proportion of the mile for each 2,000 of population in excess of 35,000 at the date of the by-law requiring the same.

The learned Judge regards it as "beyond question that the mileage of the line in London West must be treated as additional track mileage to the city," and that it must be deducted from the new lines or extension of existing lines, which the city can demand under sec. 21, by reason of the increase of population.

With great respect I am unable to find anything in the language of the by-law to require the lines in London West to be regarded as new lines, in estimating the extent of new lines which the city is authorized to demand, owing to increase of population.

Stated arithmetically it stands thus: As 2,000 is to the excess of population over 35,000, so is one mile or 5,280 feet to the extent of new line which the city may require.

It was contended by Mr. Hellmuth, that having regard to sec. 533 of the Municipal Act, a municipal census, within the meaning of sec. 21, must be one taken under the authority of a municipal by-law, and that no such census having been taken later than the Dominion census of 1901, the mileage demanded by the city was excessive, even if the learned Judge was wrong in holding that the lines in West London were to be regarded as new lines.

The last Dominion census shews excess of population over 35,000 to be 2,918, which would authorize a demand for 7,703 feet of new line. The city demand was for 7,380 feet. Mr. Hellmuth however argued that fractions of a mile could not be regarded, and that unless entitled to demand as much as two miles, they could demand no more than one, and so their demand was excessive. I find no warrant for that contention.

The authorized demand was not for an integral mile, or a number of integral miles, of line or track, but for length of line or track in the proportion of one mile to 2,000 excess of population. Having regard therefore to the excess of population over 35,000, even according to the last Dominion census, the city's demand for 7,380 feet of new line was clearly authorized.

I shall now consider the company's appeal, and that depends on whether by-law 2083 is valid, or whether the city is compellable to complete it by procuring the signature of the mayor to be affixed to it, or whether the city is estopped from disputing its validity, or the validity of the preliminary resolution of the 29th April, 1902. I think the company had good reason to expect, having regard to the resolution of the 29th April, and all that took place in relation to it, that the city council would pass a by-law in accordance with it, and that it would be safe to proceed with the work thereby contemplated, but, as the learned Judge has shewn, they took the risk of a by-law being passed, and an agreement being prepared and signed for carrying it into effect.

They were not misled in any way. They knew that a by-law was required, and that without that, anything they did was wholly unauthorized. The by-law contains a stipulation, paragraph 12, that the powers and privileges thereby granted, should not take effect and be binding on the corporation, unless and until formally accepted by the company within four weeks after its passing, by an agreement which should legally bind the company to perform, observe, and comply with its terms. And the resolution also on which the company relies in terms contemplated the preparation and execution of an agreement, but no agreement was ever prepared in pursuance either of the by-law or the resolution.

For these reasons, and for the reasons given by the learned Judge which I adopt, I am of opinion that the by-law is invalid, and that the city is not estopped from setting up its invalidity.

The determination of the invalidity of by-law 2083 disposes of the company's appeal in respect to by-laws 2099 and 2100. These by-laws prescribed, as the city was entitled to do, the routes and the speed and service to be observed by the company in the running of their cars.

The most serious objection to these by-laws was, that by reason of what the company had done in pursuance of the resolution of April, and in performance of the requirements of by-law 2083, in expectation of its being passed, compliance with the subsequent by-laws 2099 and 2100 was impossible, or

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at all events, could not be required, inasmuch as they were inconsistent with the former. - Holding, as I think it must be held, that the first by-law never became effective, that objection fails.

It was also argued for the company that, even assuming the validity of these by-laws, the Court could not award a mandamus or mandatory injunction for their enforcement, citing *City of Kingston v. Kingston, Portsmouth & Cataraqui Electric R.W. Co.* (1898), 25 A.R. 462.

That objection however is answered by the provisions of sec. 3 of the Act, 59 Vict. ch. 105 (O.), which authorizes the High Court in an action by the city, to enforce by injunction or otherwise the observance, performance, and fulfilment by the company and their officers of all provisions of the by-law 916, in which the residents of the city or its corporation are interested.

The by-laws in question were passed in pursuance and under the authority of that original by-law, and I think observance of the provisions may be enforced as provided by the Act.

I am therefore of the opinion that the appeal of the city should be allowed, and the appeal of the railway company should be dismissed and with costs.

GARROW and MACLAREN, J.J.A., concurred with MOSS, C.J.O., and OSLER, J.A.

Appeal and cross-appeal dismissed with costs, MACLENNAN, J.A., dissenting as to dismissal of cross-appeal.

G. A. B.

[IN CHAMBERS.]

RE PRINCE EDWARD PROVINCIAL ELECTION.

1905

March 2.

Parliament—Election—Recount—Jurisdiction of Deputy Judge—Deputy Returning Officer's Non-compliance with Act—Ascertaining Result—Ballots—Marking.

A deputy county court Judge, in case of the illness of the county Judge, has jurisdiction to hold a recount of ballots in an election for the Provincial Legislature.

There is nothing in the Election Act making invalid or void the votes cast at any particular poll, in case the deputy returning officer has failed to comply with the requirements of the Act after the close of the poll: and where the deputy returning officer omits to return a statement of the votes cast, but the returning officer has no difficulty in ascertaining the number cast, the votes ought not to be rejected.

Held, also, that a ballot was properly counted for a candidate which had a well formed cross in his division, although there was a distinct indication that a cross had been placed in the other division, which was afterwards erased: *Re West Elgin* (No. 1) (1898), 2 Elec. Cas. 38, at p. 45, and *Re Lennox* (1898), 4 O.L.R. 378, followed.

Held, also, that a ballot with a mark *Q* in one of the divisions was well marked: *Re West Huron* (1898), 2 Elec. Cas. 38, cited.

THIS was an appeal from the judgment of the Deputy Judge of the county of Prince Edward on a recount of ballots, which was argued on the 18th of February, 1905, in Chambers, before Maclellan, J.A.

D. C. Ross, for *R. A. Norman*, one of the candidates, appellant.

C. H. Widdifield, for *Morley Currie*, the other candidate, respondent.

MARCH 2. MACLENNAN, J.A.:—An objection to the jurisdiction of the Deputy Judge, taken by the respondent and overruled by the Judge, was renewed before me.

I do not think the objection well founded.

Sections 9 and 10 of the Local Courts Act, R.S.O. 1897, ch. 54, provide for the appointment of a Deputy Judge, and that in case of the death, illness, or absence of the Judge, he shall have authority to perform, in the place of the Judge, in the county for which he is deputy, all the duties of and incident to the office of the Judge of the county court, and all acts required or allowed to be done by the Judge of the county

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court under that or any other statute, unless when by such statute it is otherwise expressly provided.

It is admitted that the county Judge was ill at the time, this proceeding was taken and proceeded with, and there is no express provision of any statute excluding the application of the section in the case of a recount.


The principal ground of the appeal is, that the learned Judge should not have counted the ballots marked at polling sub-division No. 1, Hallowell, but should have rejected them all, because of non-compliance by the deputy returning officer with the statutory directions contained in sections 112 and 114 of the Election Act, R.S.O. 1897, ch. 173, as to proceedings at the close of the poll. It is not disputed that the alleged non-compliance by the deputy returning officer occurred, but it does not appear that the returning officer had any difficulty in ascertaining the number of votes cast at that poll for the respective parties.

The returning officer, finding that the deputy at this poll had not made or signed the statements required by the Act, took a written statement on oath from him, that he remembered that the number of votes cast for Currie was sixty-nine, and for Norman forty-eight, and that he had given a certificate to that effect to the agents of the respective candidates. The correctness of that statement on oath is not questioned, nor but that the numbers were sixty-nine for Currie and forty-eight for Norman.

There is nothing in the Act making invalid or void the votes cast at any particular poll in case the deputy returning officer has failed to comply with the requirements of the Act after the close of the poll. And sec. 133, as amended by 62 Vict. (sess. 2), ch. 5, sec. 4, makes provision for ascertaining the true facts in case the deputy returning officer has failed to comply with any such requirements. I am, therefore, of opinion that the learned Judge rightly decided that the votes polled at the sub-division referred to had been properly counted, and ought not to be rejected.

Objection was made by the appellant to the learned Judge's decision with respect to the validity or invalidity of eighteen particular ballots. I disposed of sixteen of these on the argu-

ment, affirming the decisions of the learned Judge, and I reserved two for further consideration. These were No. 5140, sub-division 1, South Maryburgh, and No. 6814, sub-division 7, Picton. No. 5140 had a well-formed cross in Norman's division, but in Currie's division there was distinct indication that a cross had been placed there, which was afterwards carefully erased with a knife or other sharp instrument. It is said to have been found in the spoiled ballot envelope, but it is not marked "cancelled," as required by section 109, in the case of a spoiled ballot; and moreover the total number of ballots found is one short of the number of votes polled at that sub-division, unless this one is counted. I think the fair inference is that this was not a spoiled ballot, and that it was placed in the envelope for spoiled ballots by mistake. If that is so, it ought to have been counted for Norman, as was done in the West Elgin case (No. 1) (1895), 2 Elec. Cas. 38 at p. 45; and in the Lennox case (1902), 4 O.L.R. 378.

The other ballot, No. 6814, was also marked in Norman's division, but was rejected, the mark being in this form  I think numerous decisions require me to hold that this ballot was well marked, and ought to have been allowed for Mr. Norman: see *West Huron* (1898), 2 Elec. Cas. 58.

The result is that the appeal fails, and must be dismissed, except as to the two ballots numbered 5140 and 6814, and that the appellant must pay the costs.

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[IN CHAMBERS.]

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REX EX REL. JAMIESON V. COOK.

March 2.

*Municipal Corporations—Councillor Elected While Member of School Board
—Disqualification.*

The respondent, having been elected in January, 1903, as school trustee for two years, took the oath of office on January 21st, 1903. On December 26th, 1904, he was nominated as councillor and school trustee, but next day filed with the secretary of the school board a memorandum in these words: "I hereby tender my resignation as candidate for trustee for 1905." He took the oath of qualification as councillor December 27th, 1904, made his declaration of office as such on January 9th, 1905, and took his seat in the council. The first meeting of the new school board, when the same was organized, was held January 18th, 1905:—

Held, that the election of the respondent as councillor must be set aside.
Rex ex rel. Zimmerman v. Steele (1903), 5 O.L.R. 565, followed.

THIS was a motion to set aside the election of the respondent Frank Cook as a councillor for the town of Midland, which was argued on the 28th February, 1905, before Mr. Cartwright, the Master in Chambers.

F. E. Hodgins, K.C., and *D. S. Storey*, for the relator.

J. E. Jones, for the respondent.

It was admitted (1) that the respondent was elected school trustee in January, 1903, for two years, and took the oath of office on 21st January, 1903; (2) that on 26th December, 1904, he was nominated as councillor, and on same day was nominated with four others as school trustee, but next day filed with the secretary of the school board a memorandum in these words: "I hereby tender my resignation as candidate for trustee for 1905;" (3) that the first meeting of the new school board was held on 18th January, 1905, when the same was organized; (4) and that Mr. Cook took the oath of qualification as councillor on 27th December, 1904, made his declaration of office as councillor on 9th January, 1905, and took his seat in the council.

On 7th February the relator caused a letter to be written by his solicitors to Mr. Cook, pointing out that he was disqualified by reason of 3 Edw. VII. ch. 19, sec. 80, sub-sec. 1 (O.), as having been a member of the school board at the time of his

election, and inviting him to consult his solicitors as to the advisability of disclaiming, so as to save costs of proceedings to have him unseated. To this, apparently, no answer was given.

March 2. THE MASTER IN CHAMBERS:—This case does not seem in any way distinguishable from *Rex ex rel. Zimmerman v. Steele* (1903), 5 O.L.R. 565. Mr. Jones argued that the present case did not come within the mischief of the Act relied on. He pointed out that the effect would be, that a school trustee would be prevented from seeking election as a councillor for three years, if his co-trustees were unwilling to accept his resignation.

The learned counsel contended with much plausibility, that the Act should not be held to apply unless it seemed quite impossible to distinguish this case from those already decided on this section. He suggested that this was a case which the Legislature had never contemplated when sec. 80 (1) of the Municipal Act of 1903 was passed.

The learned counsel may very likely be right in this view, I think it safer, however, to follow the observations of Mr. Justice Meredith in *O'Connor v. City of Hamilton* (1904), 8 O.L.R. 391, at p. 409. There, in a somewhat similar case, the learned Judge points out the danger of a Judge allowing his judgment to be influenced by "his feelings regarding the policy of the enactment, sometimes expressed in the words 'unreasonable,' and which 'I think might as well be repealed anyway;'" and, at p. 410, "If the legislation be objectionable, and ought to be mitigated, substantial relief in a constitutional way is likely to be retarded rather than accelerated, by concealing its deformities in 'astute' or 'adroit' adjudication." The motion must be made absolute and with costs, as the respondent did not avail himself of the notice to disclaim.

Something was said at the argument as to the relator having voted for the respondent. It was stated that he would deny this on oath. If the respondent wishes to pursue this further the matter can be spoken to again. But the order should not be delayed.

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[IN THE COURT OF APPEAL.]

1905

March 17.

RE ATLAS LOAN CO.

CLAIMS ON RESERVE FUND.

Company—Loan Company—Winding-up—Shareholders Contributing to Reserve Fund—Rights of Creditors.

Shareholders in a loan company, in answer to a proposal from the company, paid towards the reserve fund dividends paid to them by the company and various other sums of money, with a view to increase the reserve fund to the same amount as the paid-up stock. In winding-up proceedings:—

Held, that such shareholders were not entitled to rank as creditors upon the assets of the company with the other creditors, depositors, and debenture holders, and that any claim they had against the company and its reserve fund was subject to the payment of the debts of the company.

Judgment of Britton, J., 7 O.L.R. 706, affirmed.

THIS was an appeal from the judgment of Britton, J., reported 7 O.L.R. 706.

The appeal was argued on the 24th and 25th November 1904, before MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A.

J. A. Robinson, for the claimants, and all those who paid into the reserve fund as a class. When the manager sought to increase the reserve fund of 26 per cent. of the capital by adding 74 per cent. from the shareholders, and so make the fund equal to the stock, no proper by-law was passed, nor were the proceedings regular, so as to make the transaction legal and binding—just an invitation to the shareholders to pay in the 74 per cent. The whole arrangement was an agreement between the shareholders as to what each was to do for the other, and when they all were paid up the company was to do its share. Until then there was no agreement with the company binding in any way on the shareholders. The stock certificates did not truly state the facts. The receipts given for the payments did not put the transaction in any definite shape. All the shareholders had to come into the scheme or it could not be carried out. All did not come in, so it was never perfected. If the consideration was not performed the consideration failed, and the money is recoverable back: *Cook v. Equitable Building and*

Loan Association (1898), 104 Georgia 814. The company had no authority to increase the stock in this way, as there was no such power given in their Act of Incorporation: 61 Vict. ch. 92 (D.), *In re The Ontario Express and Transportation Co.* (1894), 21 A.R. 646; *Page v. Austin* (1882), 10 S.C.R. 132 at p. 164. The shareholders are not estopped; they did not make the representations: *In re Moore Brothers & Co., Ltd.*, [1899] 1 Ch. 627. They could not ratify any *ultra vires* acts. I refer also to White on Canadian Company Law, p. 357, and cases in note.

Hellmuth, K.C., for the depositors. There was an agreement with every shareholder who went into the arrangement. Three of the appellants were parties to an arrangement in 1896 to increase the reserve fund by leaving the dividends with the company. What was done was a voluntary subscription to the reserve fund, and if the company became insolvent the volunteers could not claim or prove for their subscriptions on an equality with outside creditors who had loaned their money on the credit of that reserve fund so increased: *In re Great Berlin Steamboat Co.* (1884), 26 Ch. D. 616; *In re Stuart's Trusts* (1876), 4 Ch. D. 213.

W. M. Douglas, K.C., and *Casey Wood*, for the debenture holders. The appellants are estopped. They received dividends on the basis of the arrangement for three or four years. They made no demand on the other shareholders for a completed agreement. After the winding-up proceedings were taken they had no rights as against the creditors. If the proposed scheme had been carried out, it would have been beneficial to both the company and the shareholders. The payments in gave the company increased credit. The scheme was not *ultra vires* of the company, which had power to issue \$1,000,000 more stock: 61 Vict. ch. 92 (D.). We refer to *In re Miller's Dale, etc., Co.* (1885), 31 Ch. D. 211; *Oaks v. Turquand* (1867), L.R. 2 H.L. 325 at pp. 344, 345, 348, 357, 361; *In re Scottish Petroleum Co.* (1882), 23 Ch. D. 413; *In re Bank of Syria*, [1900] 2 Ch. 272, [1901] 1 Ch. 115; *The Royal British Bank v. Turquand* (1856), 6 E. & B. 327.

H. L. Drayton, for the liquidator. There was no agreement to repay the money to the shareholders, and the evidence shews the fund was used for and did elevate the credit of the company.

Robinson, in reply.

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March 17. The judgment of the Court was delivered by MACLENNAN, J.A. :—This is a contest between classes of persons claiming to prove, as creditors, against the assets of the company now in course of being wound up under the Winding-up Act of Canada. The one class is composed of holders of debentures issued and sold by the company, and persons who had made deposits with the company at interest; and the other class is composed of a large number of the shareholders of the company who had paid large sums to the company as a reserve.

The learned Master held that the latter class were creditors of the company, and had a right to prove for the sums advanced by them, just as depositors and debenture holders, and to be paid *pari passu* with them.

On appeal, the learned Master's decision was reversed by Britton, J., and it was ordered that the contributors to the reserve fund were not entitled to prove their claims as creditors or to share *pari passu* with the depositors and debenture holders in the distribution of the company's assets.

This is an appeal from that judgment.

The learned Judge's opinion is reported in 7 O.L.R. 706, and contains a very full, and, I think, an adequate statement of the material facts, except that it might be inferred from that statement, that the authorized capital of the company was one million dollars, with half-a-million subscribed and \$300,000 paid up; whereas, by the Act of 1898 the capital was declared to be two millions, and the fact was that one million had been subscribed and \$300,000 paid up.

Before the year 1901 the management had, year by year, been setting apart a reserve fund out of profits earned, and on one occasion, after declaring and paying a dividend, those dividends were by arrangement paid back to the company and added to the reserve. By the end of the year 1900 the reserve had become \$78,000, or equal to 26 per cent. of the paid-up capital.

In the beginning of 1901, a new plan of adding to the reserve, not out of the earnings of the company, but by means of payments to be made by the shareholders, was put in operation. The nature and advantages of that plan are fully explained by the circulars sent out to the shareholders by the

management—the first prior to the annual meeting in February, 1901, another immediately after the meeting, and a third on the 30th April following.

In these circulars it was pointed out that each shareholder was the owner of a share of the existing reserve of \$78,000 in proportion to the amount of capital paid up by him, or 26 per cent., and if and when he paid in a further sum equal to 74 per cent. of his paid-up capital he would be the owner of a share of the reserve equal to his paid-up capital. There was a sense in which each shareholder was the owner of a proportionate part of the reserve, namely, the sense in which all the assets of a company belong to the shareholders in that proportion, subject to the payment of debts.

The inducements held out to the shareholders, and what they expected to receive as the consideration for their payments, was an increased premium on their shares and an increased dividend. The circulars suggested that when the reserve was fully paid up and became equal to the paid-up capital, the shares would command a sale at 250 or 260 per cent., and all the net profits would then be divided, and at present rate of earning might be as much as 15 per cent. per annum.

I think it is a proper inference, that all the payments, which followed the issue of these circulars, were made in response thereto and in compliance therewith, and were made in the sense and for the purposes therein set forth, and also that the rights of the respective parties must be measured and governed thereby.

The payments invited were to the amount of 74 per cent. of the paid-up capital, and were intended to be additions to, and to have the same character as, the existing reserve of 26 per cent., so as to make it 100, or equal to the paid-up capital. It was not a loan at interest; it was not to be paid back; it was to be in the nature of capital, except that no doubt the company might distribute it to the shareholders, just as they might distribute the 26 per cent. in dividends, so long as the paid-up capital was kept intact.

That such was the intention and purpose of the payments, and the sense or agreement on which they were made is apparent not only from the circulars inviting them, but from the language of the receipt taken when payments were made:—

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That receipt was as follows:—

THE ATLAS LOAN CO.

ST. THOMAS, Ont.

Received from

..... dollars for credit of 74 % reserve fund.

\$

A. E. WALLACE,
Manager.

Now, there is nothing to prevent a person from paying money to another, or to a company, either absolutely as a gift, or on any other qualified terms not contrary to law; and if he do, he must abide by the terms on which he has paid it. I therefore think these appellants can only claim a return of the sums which they have paid on the same terms exactly on which they can claim the benefit of the 26 per cent. which composed the reserve before the additions were made to it; that is to say, subject to the payment of the debts of the company. If the 26 per cent. has been lost, that is their loss; and if the additions which they have made to it have been lost, that also must be their loss, and they may not compete with creditors for reimbursement. On the other hand, if the money has not been lost they will get it back in the winding-up, in proportion to their payments, after creditors have been paid.

It was argued that these payments were made upon condition that all the shareholders should make the invited payments, and that inasmuch as some did not pay anything, the appellants have a right to recover back what they had paid. There is no evidence of any such condition. The shareholders were dealt with individually and not collectively, and each made his payment voluntarily, which was to be added to his share of the existing reserve.

A number of cases were cited on the one side and on the other, but none of them afford much, if any, assistance in determining the question. The case of *In re Great Berlin Steamboat Co.*, 26 Ch. D. 616, was the case of money paid to a company for a fraudulent purpose, and it was held that the person

making the payment could not prove for it in the winding-up, although he might have recovered it before the insolvency.

For these reasons, and for the reasons stated by the learned Judge, I think the judgment right, and that the appeal should be dismissed.

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[IN THE COURT OF APPEAL.]

C. A. ARCHER V. THE SOCIETY OF THE SACRED HEART OF JESUS.

1903

Oct. 13.

Contract—Religious Society—Member of—Service in—Dismissal from—Disfranchisement—Damages—Release—Foreign Association—Statute of Frauds.

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Jan. 23.

The defendant, the Society, was a religious Association, incorporated under the laws of France, having local Institutes in the United States, Ontario, Quebec and other countries, separately incorporated according to the laws of those countries, composed of two classes of women, those destined for teaching and lay sisters employed in household duties, with periods of probation, during the second of which they took vows of poverty chastity and obedience and became "aspirants," before being permitted to take final vows up to which latter time, the Society, according to its rules, retained the right to dismiss them for grave causes; that right belonging to the Superior General in France who might communicate it to others.

Plaintiff became a lay sister in the United States in 1884 and was admitted to the three vows of an "aspirant," but proceeded no further, remaining an "aspirant" only, until dismissed.

In February, 1901, she was transferred to an Institute in Ontario until the following June, when, in consequence of great disturbance and destruction of property, ascribed to her, she was removed to an asylum on the certificate of two physicians, as insane, until the following September, when she was declared cured and discharged.

The defendant, the Lady Superior of the local organization, reported the facts to the Superior General in France and asked for a discharge of the plaintiff from her vows; which was sent to the Lady Superior, to be used as she considered expedient, and she caused it to be delivered to the plaintiff after her release from the asylum; and the plaintiff executed a release prepared by the Society of all causes of action, contracts, etc., in consideration of \$300.00.

Plaintiff brought an action against the Society, the Institute and the Lady Superior for compensation as on a *quantum meruit* in respect of her 17 years' services and damages for wrongful dismissal, false imprisonment and imputation of insanity, alleging the release was obtained from her by importunity and undue influence:—

Held, that there was jurisdiction to entertain the action in this Province against the Society, upon the ground that the Society "resides" in this Province, and that the defence of the Statute of Frauds failed.

Held also, that the action was properly dismissed as against the Institute, and should be dismissed as against the Lady Superior, with neither of whom was there any contract, and the jury had absolved the latter from all liability in tort.

Held, lastly, that there was no liability of the Society for compensation for services or damages, and that the defence based upon the plaintiff's release should be sustained.

THIS was an appeal and cross-appeal from a judgment at the trial in favour of the plaintiff for \$5,000 and costs against the defendants, the Society of the Sacred Heart of Jesus and Elizabeth Sheridan; the action having been dismissed as against the defendants, The Mount Hope Institute.

The action was tried at London on the 30th of September and the 1st, 2nd and 3rd of October, 1903, before BOYD, C. and a jury.

F. P. Betts and *H. Cronyn*, for the plaintiff.

James Magee, K.C., and *J. B. McKillop*, for the defendants.

The facts are stated in the judgment of GARROW, J.A.

The jury brought in a verdict for wages or compensation for services for six years, \$3,000, and for damages for dismissal from the defendant Society, \$5,000.

The learned trial Judge reserved his judgment and subsequently delivered the following:

October 13, 1903. BOYD, C.:—I do not think that the Court should now uphold the release pleaded, on the ground that the plaintiff retains the \$300 and does not offer to repay it. Upon all the circumstances, the jury has found that release not binding on the plaintiff, and to my charge on this head there was no objection. The signing of that release the jury has in effect found to be improvident, made at a time when the plaintiff was without any advice or protection. It is also to be noted that the money was paid by the Lady Superior as a gratuity only, and not in settlement of any recognized claim.

As I stated when leaving the case to the jury, it did not appear that the plaintiff had any legal or equitable claim in respect to wages or compensation in lieu of wages for the period of her novitiate. She had entered the religious society on the conditions set forth in the constitution, wherein she had been instructed, and as a lay sister was bound to serve without wage or reward as member of a self-renouncing community. So long as she remained in the Society no pecuniary claim could arise; her services had been compensated from day to day by the enjoyment of or possession of the communal life. Nor could she complain when discharged from that life, unless that severance was made without good cause.

In this case it is the dismissal which, according to the finding of the jury, gives ground for complaint, and the damages for that wrongful dismissal (as found by the jury) are what the

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plaintiff may be regarded as having lost for the future—estimated by the jury at \$5,000. For this sum, the verdict has to be maintained so far as I am concerned—though I think the amount excessive—but for the \$3,000 assessed for the years of service, I do not think judgment should be entered.

I do not feel called upon to interfere on grounds of law for want of jurisdiction, as against the recovery of \$5,000 damages for the dismissal.

The constitution of the Society does not in terms provide for cases of indemnity prior to the final vows. No doubt during any unsound period, the vow of obedience would not and could not be operative, and had the actual dismissal been during any period of mental unsoundness, there would be more difficulty in the way of the plaintiff than now exists.

The jury must be taken to have affirmed temporary insanity and have absolved the defendants from liability as to the deportation and incarceration of the plaintiff at Longue Point Asylum. But on the undisputed facts, she was declared by the authorities at that institution to be completely recovered in the middle of August, 1901, and the release from her vows (which was the order of dismissal) was not given to the plaintiff till the 6th of September, when she was in full possession of her faculties and otherwise competent, as the jury must have found.

The apprehension of recurring violence or peculiarity of conduct, on which the Lady Superior no doubt acted in forwarding the release of vows from London to Montreal to be given to the plaintiff, has not been accepted by the jury as a sufficient reason for the dismissal.

The constitution calls for the existence of a grave cause before any one can be sent away from the Society, and upon this issue, in which the onus lay on the defendants, they have failed to satisfy the jury.

Though the ultimate control as to dismissal rests with the authorities in France, yet there is power of delegation given by the constitution, and the release from vows was in this case forwarded from Paris to be acted on by the Lady Superior at London according to her discretion.

There was thus, I think, a cause of action within this Province when that discretion was exercised adversely to the

plaintiff, and the release transmitted from London to be given to the plaintiff in Montreal. The plaintiff was then in good standing in the London Society, and this act was one of expulsion—which the jury finds to be wrongful.

I do not see that the Mount Hope Society, defendant, is implicated in this transaction, and I dismiss that defendant, with costs to be paid by plaintiff.

Judgment goes for the plaintiff for \$5,000 and costs of so much of the action as relates to that issue. As to the other issues, judgment is to be entered for the other defendants with so much of the costs of this action as are applicable thereto. Costs of all defendants to be set off against plaintiff's judgment and costs.

The costs of the unexecuted commissions to be given to neither party.

From this judgment the defendants, The Society and Elizabeth Sheridan, appealed, and the plaintiff cross-appealed, claiming the \$3,000 for compensation as well as the \$5,000 for wrongful dismissal.

The appeals were heard on the 11th and 12th days of October 1904, before MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, J.J.A.

G. F. Shepley, K.C., and *J. B. McKillop*, for the appeal. The parent body is in France and not domiciled here, and has no agent here. The releasing of the plaintiff from her vows took place in the Province of Quebec. The action is not properly constituted in Ontario. Even if it was, the release executed by her after advice taken, she being fully aware of what she was doing, and for a money consideration, is a bar. The Society is a purely voluntary institution under strict discipline and control, to which the plaintiff was by the rules, of which she had knowledge, bound to conform. The Society had power of dismissal for grave cause, which the evidence shows existed here; and in the absence of bad faith the dismissal cannot be reviewed even if the cause was insufficient. In such matters of discretion legal evidence is not obligatory: *Hands v. Law Society* (1888), 16 O.R. 625 at p. 632; *Guinane v. Sunnyside Boating*

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Co. of Toronto (1893), 21 A.R. 49 at p. 54; *Leeson v. General Council of Medical Education and Registration* (1889), 43 Ch. D. 366 at p. 372; *Allison v. General Council of Medical Education and Registration*, [1894] 1 Q.B. 750; *Weir v. Mathieson* (1866), 3 E. & A. 123; *Dunn v. The Board of Education for the City of Toronto* (1904), 7 O.L.R. 451 and cases there collected. The plaintiff was in a novitiate state, and had not taken the final vows and been accepted in the Society. She brought no property of any kind to the Society and has no rights in the matter in the absence of fraud, which the evidence shows did not exist. There was no contract on which she can rely. Her confinement in the asylum was brought about in the usual legal manner under the usual and regular physicians' certificates. The Mount Hope Institute has an independent charter of its own, 23 Vict. ch. 144 (C.), and the evidence does not connect it with the matters in question. The evidence also shows that what was done by the defendant Elizabeth Sheridan was done in good faith. We refer to: *Forbes v. Eden* (1867), L.R. 1 Sc. App. 568; *Dunnet v. Forneri* (1877), 25 Gr. 199; *Rigby v. Connol* (1880), 14 Ch. D. 482; *Baird v. Wells* (1890), 44 Ch. D. 661 at p. 675; *In re Beloved Wilkes's Charity* (1851), 3 Mac. & G. 440; *Wildes v. Russell* (1866), L.R. 1 C.P. 722; *The Marquis of Abergavenny v. The Bishop of Llandaff* (1888), 20 Q.B.D. 460.

F.P. Betts and *H. Cronyn*, contra. The Mount Hope Institute is, as shewn by the evidence, identical with the defendant Society and is, in fact, merely the name under which the Society was incorporated in Ontario. The record is not complete without it and judgment should go against both. The question of the release was fully and fairly left to the jury, and their finding in favour of the plaintiff will not be interfered with here; *Slater v. Nolan* (1876), Ir. R. 11 Eq. 367 at p. 386; *Waters v. Donnelly* (1884), 9 O.R. 391; *Willis v. Wells* (1892), 67 L.T. 316; *Prentice v. London, Longhurst et al* (1875), L.R. 10 C.P. 679; *Palliser v. Dale*, [1897] 1 Q.B. 257. Damages are the proper remedy, in fact the only remedy, as reinstatement in the Society could not, after what has occurred, constitute satisfactory redress; *Adley v. The Whitstable Co.* (1815), 19 Ves. Jr. 304; *The State of Ohio, ex rel. Jan Koppstein v. Slav-*

onska Lipa (1876), 28 Ohio 665. The plaintiff rendered services, has received nothing in return, and is entitled as on a *quantum meruit*. We refer to *Barnes v. Richards* (1902), 18 Times L. R. 328; *McGugan v. Smith* (1892), 21 S.C.R. 263; *Murdock v. West* (1894), 24 S.C.R. 305; *Walker v. Boughner* (1889), 18 O.R. 448; *Cross v. Cleary* (1898), 29 O.R. 542; *The Queen v. Pinder, In re Greenwood* (1855), 24 L. J. Q.B. 148; *Norris v. Seed* (1849), 3 Ex. 782; *Fletcher v. Fletcher* (1859), 1 El. & El. 420, 28 L.J.Q.B. 134; *McSorley v. The Mayor, etc., of the City of St. John* (1881), 6 S.C.R. 531; Wertheimer's Law of Clubs, 3rd ed., p. 113; *Chamberlain v. Boyd* (1883), 11 Q.B.D. 407 at p. 415; *Baird v. Wells* (1890), 63 L.T. 313 at 316.

Shepley, in reply.

January 23. OSLER, J.A.:—The case between these parties seems to me to have been overwhelmed both in the pleadings and evidence in a flood of words in which their legal rights have been confused or lost sight of by them.

The plaintiff seeks damages (1) for dismissal as if from a contract of hiring and service; (2) for wages alleged to be due under some contract of that kind, and; (3) for "incarceration," something in the nature of a wrongful arrest and imprisonment.

In April, 1884, she entered a Roman Catholic community called "The Society of the Sacred Heart of Jesus," the head office of which is said to be in Paris, France, which has branches or agencies or associate communities or convents in this country and in the United States, and the local branch of which, in London, Ontario, is separately incorporated by the name of The Mount Hope Institute.

The branch convent into which the plaintiff was admitted was at St. Louis, Missouri, U.S.

The rules of the Society, so far as important, are sufficiently referred to in the judgment of my brother Garrow.

For some reason satisfactory to her Superiors, and assented to by herself, she was in March, 1901, transferred or removed from St. Louis, Mo., to the Mount Hope Institute in London, and while there was dismissed or discharged therefrom and

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from all further connection with the institution. I cannot see that any other facts are necessary to be referred to on claims one and two in the case.

What then, was the plaintiff's status? Certainly the relation between herself and the Community was not that of master and servant, or of hiring and service. She herself admits that she was not serving for wages and that she was not receiving, or to receive, any other compensation than that of board, lodging and clothing, and the right of proceeding to take her final vows in the manner and by passing through the degrees provided for by the rules or constitution of the Society.

There was therefore no right to wages for past services in the institution or to damages, as for dismissal from any contract of service.

If not, were not the parties entirely at liberty in point of law to put an end to their relations at their own pleasure?

The plaintiff brought no money or property of any kind into the Society.

If the terms on which she joined the Community involve the idea of a contract of any kind, it is of a contract by one of the terms of which, the plaintiff bound herself to a state of perpetual celibacy and to submit to conditions (I refer to the stipulation as to obedience) which our law does not recognize as valid constituents of a contract. In one if not in both of these aspects, the situation of the parties was not controlled by any legal contract, and their relations—purely personal as they were—were, in my opinion, terminable at pleasure.

The finding of the jury absolves all the defendants for any liability for the alleged "incarceration" or wrongful arrest and imprisonment, and the release executed by the plaintiff for valuable consideration, the validity of which is not impeached by any finding of the jury, is a complete discharge not only of this, but of any other cause of action which the plaintiff may be supposed to have had arising out of her relations with the defendants.

I do not find it necessary to comment further upon the case of the defendant, Elizabeth Sheridan, which certainly fell to the ground when the jury found no damages for incarceration, or

upon other difficulties which stand in the way of the plaintiff's action against the Sacred Heart.

I have had an opportunity of reading my brother Garrow's judgment, in the conclusion of which I agree and would allow the appeal.

GARROW, J.A. :—This is an appeal and cross-appeal from the judgment at the trial before the Chancellor and a jury, in favour of the plaintiff for \$5,000 and costs against the defendants, The Society of the Sacred Heart of Jesus and Elizabeth Sheridan; the action having been dismissed as against the defendants, The Mount Hope Institute.

The Society of the Sacred Heart of Jesus, as alleged in the statement of claim and not specifically denied in the statement of defence, is a corporation incorporated under the laws of France. As set forth in the constitution and by-laws, the object of the Society is "to glorify the Sacred Heart of Jesus by labouring for the salvation and perfection of its members through the imitation of the virtues of which the Divine Heart is the centre and model, and by consecrating its members as far as it is possible for persons of their sex, to the sanctification of others as the work dearest to the Heart of Jesus. . . . The means which the Society adopts . . . are chiefly; (1) the education of children as boarders; (2) the gratuitous instruction of poor children as day scholars; (3) retreats afforded to persons living in the world; (4) such intercourse with persons living in the world as springs necessarily from its works."

For the purpose of carrying on its affairs the Society apparently acts through local organizations, of which there are several in the United States, one in the Province of Quebec, and one in the Province of Ontario, which, however, all appear to be separate corporations; the whole being under the spiritual direction and control of the hierarchy of the Roman Catholic Church.

The Society itself is composed of two classes of women, those destined for teaching and those who are to be employed in household duties, the latter called lay sisters. For both classes there is first, as a condition of becoming a member, a period of probation of three months, at the end of which the candidate, if accepted, is admitted to take the three vows of

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poverty, chastity and obedience, and is thereafter called an aspirant, in which condition she remains for a further period of five years, at or towards the end of which there is still a further period of probation of three months, and then, if finally accepted, she is admitted to take the final vows of stability. Rule 11 provides that "The Society does not bind itself to its members until they make their last vows, but up to that time the Society retains the right of dismissing them for grave causes (which are specified in the constitution), and then by the very fact the subject is released from her vows."

The rules further provide that the power of dismissal belongs of right only to the Superior General, who, however, may communicate it to others.

The plaintiff became a member of the Society, in the class known as lay sisters, at the city of St. Louis, in the State of Missouri, in the month of April, 1884, at the age of nineteen years, and after the period of probation was admitted to the three vows of an aspirant. But for some reason not clearly stated she proceeded no further, but remained an aspirant only until she was dismissed, as hereafter stated.

From St. Louis the plaintiff was, in the month of March, 1901, transferred without any apparent reason to the Mount Hope Institute, at the city of London, Ontario, where she remained until the following month of June, when in consequence of great disturbance and destruction of property in the Institute, ascribed to her, she was removed to the Longue Point Insane Asylum, in the Province of Quebec, upon the certificate of two physicians that she was insane, and she remained there until the following September, when she was declared to be cured and was discharged.

While the matter of the plaintiff's alleged insanity was still in doubt, the Superior at the Mount Hope Institute, the defendant Elizabeth Sheridan, reported the facts to the Superior General at Paris, and asked for the discharge from her vows of the plaintiff, and upon her report the Superior General at Paris transmitted to the defendant Elizabeth Sheridan a written release of the plaintiff from her vows, dated June 10th, 1901, to be used as the defendant Elizabeth Sheridan should consider expedient.

The defendant Elizabeth Sheridan, who was herself familiar with all the facts, and acting apparently from no improper or malicious motive, caused this release from her vows to be delivered to the plaintiff at the city of Montreal, in the Province of Quebec, on the 6th of September, 1901, after her release from the asylum, whereby it is said the plaintiff ceased to be a member of the Society. A day or two afterwards, while still at the city of Montreal, the plaintiff executed a release under seal, dated September 7th, 1901, prepared by the Society, whereby in consideration of the sum of \$300 then paid to her, she released the Society, the Mount Hope Institute and Les Dames Religieuses du Sacre Cœur, and any and all persons who are members of the said Society, from all manner of actions, causes of action, debts, accounts, covenants, contracts, claims and demands.

Then on the 13th day of May, 1902, this action was brought against the Society, the Mount Hope Institute and Elizabeth Sheridan, claiming wages, damages as for a wrongful dismissal, and also damages for the alleged false imprisonment and imputation of insanity; the plaintiff contending that she was not at any time insane. No claim is made for reinstatement.

The plaintiff's claim for wages is based, in the statement of claim, upon the allegation that there was an implied contract to pay her a reasonable sum for her services in case the Society dismissed her wrongfully, or in contravention of the constitution; while her claim for damages as upon a wrongful dismissal is based upon the allegation that by reason of such dismissal she has lost the benefit of the home and support and maintenance during her life to which she was entitled as a member of the Society.

A number of defences were pleaded by the several defendants.

The Society, protesting against the jurisdiction of the Court, obtained leave to enter a conditional appearance and pleaded to the jurisdiction, that the defendants, the Society, is a French association for religious purposes, not formed to carry on business, but that as part of its religious and charitable work some of the members thereof conduct schools; that it has no business

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branches or agencies, but that groups of its members reside together in various places; that the plaintiff, a citizen of the United States of America, was permitted to become a member of the Society there and to reside in the establishments wherein the members of the Society resided in the United States; that after her short residence in the Mount Hope Institute (in which the members of the Society reside and carry on a school in this Province) she went to the city of Montreal and there became a patient in the Asylum for the Insane, and that afterwards, while resident in that Province, she was released from her vows and from being a member of the Society, for grave and serious reasons, and they submit that under the circumstances the plaintiff cannot maintain an action in Ontario.

They further denied any contract with the plaintiff, express or implied, and pleaded the Statute of Frauds and the release before mentioned as defences.

These defences are common to all the defendants, but in addition the Mount Hope Institute pleaded that it is a separate corporation, incorporated under the laws of Canada, and is not identical with the parent Society; and that the plaintiff was never a member of the Institute and had no contract or relation whatever with it. And the defendant Elizabeth Sheridan by her defence denied the malicious acts charged against her.

To the defence of the release, the plaintiff replied that the same was obtained from her by the importunity and undue influence of the defendants and their agents, but she retained the \$300 and at no time offered to return it to the Society.

At the trial, upon opening the case it appears from the notes of evidence that the following took place: "Mr. Betts (counsel for plaintiff)—'Before addressing the jury, I wish to say this—a release is set up, and it was also set up it was obtained by undue influence. I presume in regard to that your Lordship will follow the recent English practice and leave that as well as the other to the jury.' His Lordship—'The release is in the pleadings?' Mr. Betts—'Yes, my Lord.' His Lordship—'I suppose it will all go to the jury. I will let the whole thing go to the jury.'"

Then evidence at great length was given on behalf of both

plaintiff and defendants, the trial lasting some four days, and in the end the questions of fact were submitted to the jury.

In his charge the learned Chancellor pointed out, that the great or controlling question was to determine if the plaintiff was or was not of sound mind when she did the acts complained of, if she did them; or were the acts of destruction committed by other inmates as the result of a plot against the plaintiff, for the purpose of getting rid of her, that having been her main contention on this head, and as to the latter event he said: "If you think there was a plot you should not let the release interfere, but if you really think she was insane and that this Mother was acting in the best interests of the woman herself, and of the Community over which she presided, then you ought to find that the release is worth something and should bar the action."

As to the dismissal from the Society, he said: "Then when the woman recovered, what was the Society to do? Were they acting reasonably or not in doing as they did, paying her \$300 and let her be at liberty, freeing her from her vows, so that she could go abroad again and make her own living, or were they obliged or should they in justice have taken her back? Now it may be a question of law, but I will leave it to you to pronounce upon that question, whether this was a reasonable step, a proper step, on the part of the Community to say that they would not receive her back. . . . I leave it to you to say whether you think they have acted rightly or wrongly in this matter. If you think they should take her back and have not taken her back, wrongfully, say what damages there should be. Many questions of law will arise on that which I need not trouble you with. . . . If you think she should get wages say how much they should be. I myself do not think she can have any claim for wages, because during the seventeen years she was there she got all that she contracted for. . . . If you think there was the plot to trump up a charge of insanity and put the woman in prison, then you can give most substantial damages for such a piece of misconduct as that."

These extracts seem to succinctly and sufficiently formulate the aspect in which the several heads or leading ideas were placed before the jury.

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To the charge, several objections were taken. Plaintiff's counsel, among other objections not necessary to set out, objected that it was improper to say, that the release might only be disregarded in case the jury found there had been a plot, that the proper instruction was, that it might be disregarded if upon any ground the plaintiff was entitled to recover, and to this objection the learned Chancellor finally acceded, and so instructed the jury. Then counsel for the defendant in turn objected thus: "Mr. Magee—'I would ask your Lordship to reverse what you have just done; that if the plaintiff is entitled to recover on any ground, then the jury may disregard the release. I would ask your Lordship to rule the other way.'" Then the learned Chancellor continued to the jury: "Now, gentlemen, about that release; I want to call your attention to this, that the lawyer, Mr. Lamothe, says this about it: 'I explained to her—I told her that she had been dismissed from the Society, and I explained to her that by accepting the money she would lose all right of action. She told me she was going to see somebody when she went away. I told her not to sign if she did not want to abandon her claim. I did not know they were anxious to have it signed. She was well aware of the effect of the document and was free to sign it or not to sign it. There is no etiquette in Quebec to have another lawyer called in.'" And what the plaintiff says herself about it is this: "I had no money, no clothing, and I went to the Jesuit College to get an English-speaking priest, and I asked counsel of him. I said I did not want to sign the release. He said, 'Sign it, sign it with the intention of going home,' and I did so." Now you have to say on that, whether you think that release should bind the plaintiff or not. If she knew her rights, if she got advice, and signed it deliberately intending to give up any right of action and take this money, and be satisfied, you may find upon that." "Mr. Magee—'Her intention in signing the release would not affect the defendants.' His Lordship—'No, the intention was not disclosed. I think I will leave it as I have with the jury.'"

After the jury had been out for about two hours they were sent for by the learned Chancellor, when this took place: "A juror—'Your Lordship, there are some of the jury would like it explained to see if they could put in damages, not for this in-

carceration but for dismissal.' His Lordship—' You can take that into consideration. If you think there should not have been a dismissal you can give damages simply on that head, leaving out the incarceration. If you think the incarceration was all right, but that there should not have been a dismissal based upon it, you can give damages simply for the dismissal, and ten of you can agree.'” The jury then again retired, and after an absence of 25 minutes returned with this verdict as their only findings: “ The Jury—‘ We have agreed upon wages for the last six years, \$3,000 ; dismissal, \$5,000.’ ” And upon these findings the learned Chancellor gave judgment for the plaintiff for the \$5,000 damages against the defendants, The Society and Elizabeth Sheridan, and otherwise dismissed the action.

And from this judgment the defendants, The Society and Elizabeth Sheridan, appeal, and the plaintiff cross-appeals claiming to hold the defendants, the Mount Hope Institute, and to recover the \$3,000 found as wages as well as the \$5,000 for wrongful dismissal.

The questions before us on this appeal are, in effect, the questions of law to which doubtless the learned Chancellor referred in his charge to the jury, and which I think are still open, notwithstanding the verdict.

I will begin by disposing of the contentions about which I have the least doubt.

I am of the opinion that there was jurisdiction to entertain the action in this Province against the Society, upon the ground that the Society “ resides ” in this Province within the meaning of that term, as used in the authorities upon the subject. See *Haggin v. Comptoir d'Escompte de Paris* (1889), 23 Q.B.D. 519 ; *Machado v. Fontes*, [1897] 2 Q.B. 231 ; *Tytler v. Canadian Pacific Railway Co.* (1899), 26 A.R. 467. And for the further reason that to the action as framed the defendant Elizabeth Sheridan and the Mount Hope Institute, both resident in this Province, were proper parties and were properly joined with the Society as defendants. See Rule 162 (g).

I think the defence of the Statute of Frauds fails. See *McGregor v. McGregor* (1888), 21 Q.B.D. 424.

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I think the action was properly dismissed as against the defendant the Mount Hope Institute. That defendant is clearly a separate corporate entity incorporated by a Canadian statute. And with it as a separate corporation, there is no pretence for saying that the plaintiff ever had any contract or other connection whatever.

And I also think for a similar reason, that the action should have been dismissed against the defendant Elizabeth Sheridan. The plaintiff never had a contract of any kind with her. The jury have by the verdict absolved her from all liability in tort, and the result must be that she too is entitled to be dismissed from the action.

This brings me to the main question, the liability of the Society (1) for the wages assessed by the jury, and (2) for the damages for the wrongful dismissal. As to the first of these, I agree with the judgment of the learned Chancellor, and for the reasons which he stated. As to the second, I have had more difficulty, but after consideration, my opinion clearly is that the plaintiff's case fails. The action is not brought for an injunction or to compel a restoration to membership, as in the so-called "club" cases which were cited to us, but is necessarily based wholly upon contract, in so far as the causes of action for wages and wrongful dismissal are concerned, the two causes of action to which the verdict is confined. That contract, whatever it was, was made in the State of Missouri. There is no evidence before us that the laws of that State differ from the laws in force in this Province, and in the absence of such evidence, I am at liberty to assume that no such difference exists. *Hope v. Hope* (1857), 8 DeG., M. & G., 731; *Lloyd v. Guibert* (1865), 6 B. & S. 100, L.R. 1 Q.B. 115. But even if such difference did exist and had been proved, the Courts in this Province would not enforce here a contract which by our law is illegal or contrary to public policy, as that term is understood in this Province.

We are now dealing with the future. As to the past, the law might and usually would in the absence of express contract imply one to pay a reasonable price for services rendered. But there can be no similar implication as to the future. There must in the latter case be an existing agreement, legally bind-

ing on both parties at the time of the breach complained of, based upon valuable consideration, which may of course, as here, consist of mutual promises, and the things promised or contracted to be done must be lawful things, otherwise the contract is no contract in law and as to the future binds neither side.

The only consideration moving from the plaintiff was her vows of poverty, chastity and obedience. In Pre-Reformation days a profession of religion, as it was called, which consisted in taking similar vows, had, if made in England at least, the curious effect of creating civil death, and the professed became thenceforth subject only to the canon law. But there is now no such escape from the ordinary law by which every one else is bound. See *Evans v. Cassidy* (1847), 11 Ir. Eq. R., 243. Religious societies, whether Roman Catholic or Protestant, are merely tolerated. They are not illegal, but they have no special status before the law, and their contracts must be construed from the same standpoint and be subject to the same rules as apply to ordinary contracts.

Assuming then, that these vows were simply so many promises made to and accepted by the Society, followed by the promise on the part of the Society to maintain, and that thereby at least the outward form of a contract was created, I proceed to the next step, which necessarily is to examine in a legal sense the nature and extent of the plaintiff's promises or vows.

By the vow of chastity, as interpreted in the light of the constitution, it is quite beyond question that the plaintiff engaged never to marry.

By the vow of poverty she promised to divest herself of all her property of every kind, present and future, retaining absolutely nothing for herself.

And by the vow of obedience she promised implicit obedience at all times and in all things to the orders, whether reasonable or unreasonable, and indeed whether legal or illegal, for there is no expressed exception, of the Superior, whose voice the constitution declares is to be to her as the voice of God. She is given no part or share in the management of the Society. She is as a lay sister simply to labour, in practically a menial position (the plaintiff was a cook or cook's assistant) for the

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rest of her life. And the only financial consideration for this total surrender of liberty is simply to be such maintenance as the Society may choose to supply.

In my opinion such a contract, however meritorious the object, is incapable of enforcement and is wholly illegal and void, on grounds of public policy. The law will not enforce a contract in general restraint of marriage. See the case of *Crowder-Jones v. Sullivan*, ante p. 27, recently before this Court. Nor will it permit a person to surrender or to transfer in advance all the duties and obligations of organized society, which inherently attach by law to every member of such society, into the keeping of another, and especially will it not allow under the name of service a servility which even if voluntary is in effect neither more nor less than slavery. In the case of *Davies v. Davies* (1887) 36 Ch. D. 359 at p. 393, Bowen, L.J., says: "The law of England allows a man to contract for his labour, or allows him to place himself in the service of a master, but it does not allow him to attach to his contract of service any servile incidents,—any elements of servitude as distinguished from service." And in an elaborate and very learned argument before Lord Mansfield by a famous lawyer, this language was successfully used: "The law of England will not permit any man to enslave himself by contract. . . . The law of England may perhaps give effect to a contract of service for life; but that is the *ne plus ultra* of servitude by contract in England. It will not allow the servant to invest the master with an arbitrary power of correcting, imprisoning, or alienating him; it will not permit him to renounce the capacity of acquiring and enjoying property, or to transmit a contract of service to his issue. In other words, it will not permit the servant to incorporate into his contract the ingredients of slavery: In *Re James Sommersett*, a negro (1771-1772), 20 St. Trials 1, pp. 49, 50.

And in this Province not only have we inherited the common law of England, but we have apparently gone further, for we have here an express statutory provision in R.S.O. 1897, cap. 157, the first section of which in express terms prohibits slavery, or "a bounden involuntary service for life" on the part of a negro "or other person." And the second section

provides that "no *voluntary* contract of service or indentures entered into by any parties shall be binding on them, or either of them, for a longer time than a term of nine years from the day of the date of such contract."

But the plaintiff was not only bound to prove a legal contract, and a breach, but also the resulting damages. The jury have, it is true, awarded \$5,000, but a perusal of the evidence leads me not merely to the expressed opinion of the learned Chancellor, that this sum is too large, but that it is wholly unsupported by the evidence. On the contrary, there was in fact clear proof by the plaintiff herself in her effort to make a case for large wages for the past years, that she had financially gained rather than lost by the dismissal.

Under these circumstances the damages should in any event have been merely nominal.

And finally, and with deference, I think the defence based upon the plaintiff's release should have been sustained.

The plaintiff admits, that she knew perfectly what the meaning and effect of the document was. She at first refused to execute. She had it in mind then to sue the Society and so informed the attorney, and she was distinctly told by him not to execute if she was still of that intention. She then consulted an adviser of her own selection, an English-speaking priest, who advised her to execute and to go home, and she, acting on this advice, returned to the attorney's office and did execute, and received the money. She was not importuned or coerced, nor in any way imposed upon by the Society or its agents. Nor was her act, in my opinion, even an improvident one, except as viewed in the false light of the very extravagant assessment of damages made by the jury.

Then she accepted and kept the money, and at no time offered to return it. She cannot be allowed, in the language of the old cases, to "approbate and reprobate."

The case cited by Mr. Betts, of *Barnes v. Richards*, 18 Times L. R. 328, is entirely different. There was there an admitted balance due to the plaintiff exceeding the amount he had received on executing the release. No such thing exists in the present case.

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The burden of proof was, of course, upon the plaintiff. She was bound to adduce proper evidence to shew some legal ground of attack. She only succeeded in shewing that she was in poverty and needed the money, but she quite failed to shew that the defendants had taken any advantage of her poverty by any kind of importunity or pressure, or other influence of any kind to secure a release which she would not otherwise have given; indeed she says, in her evidence at the trial, that if the \$300 had been given to her in cash instead of in the shape of a troublesome cheque she would probably have been satisfied with it.

I think the appeal should be allowed, the cross-appeal dismissed, and the action dismissed with costs.

MOSS, C.J.O.; MACLENNAN and MACLAREN, JJ.A., concurred.

G. A. B.

[CLUTE, J.]

CANADIAN PACIFIC RAILWAY COMPANY

V.

OTTAWA FIRE INSURANCE COMPANY.

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Insurance—Fire Insurance—Standing Timber—"Property."

The defendants, an insurance company incorporated under the laws of Ontario insured the defendants, a railway company having a branch line in the State of Maine, "against loss or damage by fire . . . on property as follows: on all claims for loss or damage caused by locomotives to property located in the State of Maine not including that of the assured." By the statute law of the State of Maine, where "property" is injured by fire communicated by a locomotive engine, the railway company is made responsible and it is declared to have an insurable interest in the property along its line for which it is responsible:—

Held, that the policy in question was, in consequence of this statutory provision, a valid policy of fire insurance, and not an *ultra vires* policy of indemnity, but that the property in respect of which the insurance attached was that defined by the enabling section of the Ontario Insurance Act (R.S.O. 1897, ch. 203, sec. 166), and that standing timber was not included

ACTION tried at Toronto on the 23rd of February, 1905.

W. R. Riddell, K. C., and *Angus MacMurchy*, for the plaintiffs.

G. F. Shepley, K.C., and *F. A. Magee*, for the defendants.

March 24. CLUTE, J.:—The plaintiffs bring this action to recover sums of \$5,000, \$5,000, and \$11,000, paid as premiums for insurance for loss or damage by fire to the amount of \$75,000, under a policy of insurance, dated the 9th of May, 1901, for one year, a renewal thereof for one year, dated the 11th of May, 1902, and a further policy for three years dated the 11th of May, 1903, or in the alternative for payment for loss under the last mentioned policy of \$4,698.94, and interest

The special terms of the agreement are as follows:

"Ottawa Fire Insurance Company, Head Office, Ottawa, Canada, in consideration of \$5,000 and of the agreements and conditions herein contained, does insure the Canadian Pacific Railway Company against loss or damage by fire to the amount of \$75,000 on property as follows, all more fully described in application for this insurance which forms part and parcel of this policy, to wit: On property as per wording hereto

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attached. Canadian Pacific Railway Company \$75,000. On all claims for loss or damage caused by locomotives to property located in the State of Maine, not including that of the assured, or upon land owned, leased, or operated, by the assured. The loss paid by the assured upon all verdicts, judgments and settlements for said claims against the assured or railroad company owning the line of road, shall be considered full proof of all claims under this policy.

It is understood and agreed that it is the intention to have included in this policy all parts of all the railroads entering into or forming a part of what is known as the Canadian Pacific Railway System, including also tracks of the Maine Central Railroad Company, at and between Mattawamkegg and Vanceboro, and that under this policy is also covered side tracks and branches extending from, or operated in connection with said railway, whether built or owned by said railway, or others, and also such additional tracks as may have been constructed or acquired, or as may be constructed or acquired during the term of this policy, and so situated as in operation to become a part of the system of railroad embraced generally by this policy. Also it is further understood and agreed that at times locomotives not belonging to the assured are, or may be, run on the various railroads covered under this policy, and that when so run they shall be considered the same as if they were the locomotives of the assured.

It is also understood and agreed that this company shall not in any event be liable under this policy for loss to property located outside of the State of Maine.

It is understood and agreed that this company shall not in any event be liable under this policy for a greater sum than \$20,000, for loss or damage caused by any one fire.

It is understood and agreed that this insurance company shall not be liable under this policy, except upon claims upon which the insured's payment is \$5,000, or more, on account of loss by any one fire, and then this company shall be liable only for amount of loss sustained in excess of \$5,000.

Other insurance permitted.

And the said company hereby covenants and agrees with the assured, but subject to the conditions herein contained,

which are to be taken as part of this policy, that if the property hereinbefore mentioned is destroyed or damaged by fire at any time between the hour of twelve o'clock noon of the 11th day of May, 1901, and the hour of twelve o'clock noon of the 11th day of May, 1902, or during such further period or periods for which the assured shall, from time to time, have paid in advance the renewal premium or premiums required by the company, and for which the company shall have issued a renewal receipt or receipts, the company will make good unto the assured all such loss or damage by fire, not exceeding in respect of each of the several subject-matters above specified the sum set opposite thereto, or the interest of the assured therein, and not exceeding in the whole the sum of \$75,000, the said loss or damage to be estimated according to the actual cash value of said property at the time the fire shall happen. Provided always that the capital stock and funds of the company shall alone be answerable to the demands thereupon under this policy, and that no director or shareholder of the company shall be liable to any such demands beyond the amount unpaid upon his shares of the capital stock of the company held by him at the time such demand is made."

The defendants were paid the sum of \$5,000, as consideration therefor. On the 11th of May, 1902, the plaintiffs paid to the defendants a further sum of \$5,000, as a renewal of said policy for a further period of one year. No claim was made by the plaintiffs upon the defendants under the said policy of insurance or the renewal thereof for loss or damage sustained by it during said two years.

On the 11th of May, 1903, in consideration of \$11,000, paid by the plaintiffs, the defendants issued a further policy of insurance to the plaintiffs in terms similar to those contained in the first mentioned policy as above set forth, except the difference in consideration and that the period of liability was for three years, and a further clause that "this is a binding insurance for full term of policy neither party having the privilege of cancelling during currency of same."

On the 11th of May, 1903, and while the last mentioned policy was in full force and effect, (if it be a good and valid contract of insurance) fire was communicated from one of the

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plaintiff company's locomotives to certain property in the State of Maine whereby the said property was damaged as was alleged by the owners thereof to the extent of \$10,000, and upwards.

The owners thereupon made claims upon the plaintiffs for the amount of their loss and damage and after investigation and proof had been given to the satisfaction of the plaintiffs that such loss and damage had been sustained, the claims were settled by the payment by the plaintiffs to the claimants of the sum of \$9,698.94.

Full particulars of the said claim were delivered by the plaintiffs to the defendants and payment demanded from the defendants of the sum of \$4,698.94, being the amount in excess of \$5,000, as mentioned in said policy of insurance.

The defendants denied all liability and claimed that they had no power under their charter to insure the property so destroyed or damaged or to indemnify the plaintiffs in respect thereof.

The defendants were by letters patent issued pursuant to the Ontario Insurance Act, R.S.O. 1897, ch. 203, and dated the 30th of September, 1899, created a body corporate and politic "for the transaction of such kind or kinds of insurance as may be authorized by the provincial license to be from time to time issued to the company under the said Act," and "capable of exercising all the functions of an incorporated company for the transaction of such insurance as if incorporated by a special Act of the Legislature of Ontario and capable by their corporate name of suing and being sued, pleading and being impleaded, in all courts whether of law or equity and with the powers, rights, limitations, duties and obligations by the said Act conferred and imposed upon a company incorporated thereunder."

Section 166 of the said Act is as follows: "Every company licensed and registered for the transaction of fire insurance may, within the limits prescribed by the license and registry, insure or reinsure dwelling houses, stores, shops and other buildings, household furniture, merchandise, machinery, live stock, farm produce, and other commodities, against damage or loss by fire or lightning, whether the same happens by accident

or any other means, except that of design on the part of the assured, or by the invasion of an enemy, or by insurrection."

It was in exercise of the powers conferred by this section that the defendants issued the policies of insurance above referred to, and the defendants claim that they do not cover or extend to standing timber and land, the destruction of which, or damage to which, forms the subject of the plaintiffs' claim.

The defendants contend that the policy is still in full force and effect and binding on the defendants and that by the said policies the plaintiffs have been fully insured and indemnified against claims for loss or damage to such property as the defendants have power to insure; nor do the defendants deny their liability to the plaintiffs in respect of loss or damage that may occur to the property insured by it during the currency of the said policy dated the 11th of May, 1903.

The defendants further contend that as a matter of law the word "property" in the said policies mentioned should be construed with reference to the statutory powers of the said company and so as to exclude any species of property to the insurance of which said statutory powers do not extend and submit that standing timber and land are *ultra vires* of the defendants to insure.

The plaintiffs upon the other hand, submit that if this be so then there is a failure of consideration and that the plaintiffs are entitled to recover \$21,000 paid as premiums with interest from the date of payment, and in the alternative if it be held that the said policies of insurance are valid and binding upon the defendants, the plaintiffs claim payment of the sum of \$4,698.94 together with interest.

On the argument, although the point was not taken in the pleadings, the plaintiffs' counsel strongly urged that the agreement set forth in said policies between the plaintiffs and the defendants was really not a contract of fire insurance at all, but was rather in the nature of a guarantee insurance and was not within the scope of the company's powers; that there was, therefore, a complete failure of consideration, and that upon that ground the plaintiffs are entitled to recover the premiums paid.

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Some evidence was offered tending to shew that it was not the intention of the defendants to insure standing timber and land against loss or damage by fire, and the plaintiffs' counsel insisted that if this be so, as it was the intention of the plaintiffs to obtain such insurance, the parties were never *ad idem*.

I do not think the evidence offered at the trial outside of the written documents can vary the contract between the parties, and I am of opinion that their rights must be decided upon the written documents as they stand.

The first question, then, is as to the scope and meaning of the word "property" as mentioned in the policy of insurance. It reads that the defendants insure the plaintiffs against loss or damage by fire to the amount of \$75,000 "on all claims for loss or damage caused by locomotives to property located in the State of Maine, not including that of the assured, etc."

The word "property" occurs in R.S.O. 1897, ch. 203, sec. 2, sub-sec. 41, where it is declared that insurance shall include "insurance of property against any loss or injury from any cause whatsoever, whether the obligation of the insurer is to indemnify by a money payment or by restoring or reinstating the property insured."

Then in the margin of section 166 it is stated "'property' which may be insured." Here we find the meaning of the word "property," so far as it relates to fire insurance, limited to the classes of property therein defined.

I think that standing timber and land do not fall within any of the classes of property therein specified.

What, then, is the meaning of the word "property" mentioned in the agreement and how should it be construed?

"A liberal construction should be put upon written instruments so as to uphold them if possible and carry into effect the intention of the parties:" Broom's Legal Maxims, 5th ed., p. 540; *Broom v. Batchelor* (1856), 1 H. & N. 255.

"If the words of the instrument will reasonably bear the interpretation making it valid, we must not construe them so as to make it void:" *Mare v. Charles* (1856), 5 E. & B. 978.

"Where there are two modes of reading an instrument and the one destroys and the other preserves, it is a rule of law and

of equity following the law in this respect, for it is a rule of common sense that you should rather lean towards that construction which preserves than towards that which destroys:" *Langston v. Langston* (1834), 2 Cl. & F. 194, at p. 243; referred to in *Baker v. Tucker* (1850), 3 H.L.C. 106, at p. 116.

Here we have the statute using the word "property" in a limited sense and clearly defining its scope and meaning. We have a contract purporting to be made in pursuance of the powers given under the same Act where the word "property" is used. By giving it the meaning defined by the Act the contract, if not void upon other grounds, is valid. By giving the meaning contended for by the plaintiffs, the contract is invalid.

The defendants never insured or assumed to insure standing timber on any other occasion and I do not find anything in the evidence to suggest, nor is it contended, that the defendants intended to insure standing timber in this case. In my opinion, looking at the contract as it stands and having regard to the statute in pursuance of which it purports to be made, the meaning of the word "property" as therein used, is limited to the classes of property defined in section 166 of the Insurance Act. And so finding, I am of opinion that the plaintiffs are not entitled to recover \$4,698.94, being the amount of the loss claimed. It may be mentioned here that while property other than standing timber was included in the claim, it was stated that this property would not exceed \$5,000 and therefore, if the standing timber were not included, no claim could be made for the other property.

The question remains, was this a fire insurance at all within the scope of the Provincial Act above referred to, or is it *ultra vires*? This point, though not expressly taken in the pleadings, was strongly urged on the argument, which was, as I understood it, to this effect: The property burned was not insured nor intended to be insured. The scope of the contract was, in short, a guarantee to indemnify the defendants against a possible loss which they might be called upon to pay by reason of fire originating from their locomotives, if claim should be made and successfully made, and the loss amount to more than \$5,000 from any one fire; that it was in the nature of a guarantee similar to the risks covered by employers in case of injury

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to their workmen and that it was not a fire insurance in any proper sense of the word or within the scope of the company's charter. I have reached the conclusion that this point is not well taken. The contract is expressed to be an insurance "against loss or damage by fire . . . on property as per wording hereto attached, \$75,000, on all claims for loss or damage caused by locomotives to property located in the State of Maine, not including that of the assured." It is the property for the destruction of which the plaintiffs may be liable and not that liability itself, which is insured against loss or damage. See *Eastern R. W. Co. v. Relief Fire Insurance Co.* (1867), 98 Mass. 420, at p. 424.

The contract being within the powers of the defendant company to make, was there such an insurable interest in the plaintiffs in any property along the line of their railway through the State of Maine, as would enable them to effect an insurance upon it against loss or damage, which they might be called upon to pay by reason of fire originating from their locomotives. It is laid down in Porter on Insurance, 4th ed., p. 57, that "although risk and property generally go together they are not necessarily associated and the risk alone will suffice to sustain the insurance:" citing *Anderson v. Morice* (1875), L.R. 10 C.P. 609, at p. 619; *Colonial Insurance Co. v. Adelaide Marine Insurance Co.* (1886), 12 App. Cas. 128. "The peril must be such that its happening might bring upon the assured a pecuniary loss, but it is sufficient that it might bring a loss, and by no means necessary that it should certainly have that consequence were it to happen:" citing *Anderson v. Morice* (1876), 1 App. Cas. 713, at p. 742, *per* Lord O'Hagan.

A common carrier has an insurable interest in the goods carried by him, which he may insure to their full value without regard to his liability to the owner of the goods: *Crowley v. Cohen* (1832), 3 B. & Ad. 478; *London and North Western R. W. Co. v. Glyn* (1859), 1 E. & E. 652; so also has a warehouseman: *Waters v. Monarch Fire Assurance Co.* (1856), 5 E. & B. 870.

In many of the United States of America there are statutes which expressly declare that a railway company is liable for a loss occasioned by fire escaping from its engines and that it has

an insurable interest in the property for the loss of which it may be held liable. There is no case in England or Canada, so far as I am aware, where it has been held that a railway company has an insurable interest in the property for which it may be held liable for loss by fire escaping from its engines. In the State of Maine and other States of the Union such a statute has existed for many years. For decisions under state law see *Pratt v. Atlantic & St. Lawrence R.W. Co.* (1856), 42 Me. 579; *Perley v. Eastern R.W. Co.* (1867), 98 Mass. 414; *Andrews v. Union Mutual Fire Insurance Co.* (1854), 37 Me. 256; *Hart v. Western R.W. Co.* (1847), 13 Metc. 99. Counsel agreed that the law in the State of Maine at the time the fire in question occurred, was contained in the Maine statute, a copy of which has been handed in since the trial and is as follows: "When a building or other property is injured by fire communicated by a locomotive engine the corporation using it is responsible for such injury, and it has an insurable interest in the property along the route, for which it is responsible, and may procure insurance thereon. But such corporations shall be entitled to the benefit of any insurance upon such property effected by the owner thereof less the premium and expense of recovery. The insurance shall be deducted from the damages, if recovered before the damages are assessed, or, if not, the policy shall be assigned to such corporation, which may maintain an action thereon, or prosecute, at its own expense, any action already commenced by the insured, in either case with all the rights which the insured originally had." Revised Statutes of Maine, 1903, ch. 51, sec. 87.

It is clear, I think, that the plaintiffs have not an interest in property other than their own along their line in Canada upon which they could effect an insurance, and it is very doubtful, I think, if the defendants can issue a valid policy to cover a case of that kind. The defendant company is incorporated in Ontario. Assuming that it could not take such a risk in Canada, does that preclude it from issuing a policy and taking a risk in the State of Maine, where the law declares that a railway company has an insurable interest in such property? Would this be an attempt to enlarge the powers of the company by virtue of a foreign statute?

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That depends, it seems to me, upon whether or not the statute declaring the insurable interest has relation to the railway company or to the insurance company; manifestly to the railway company. It simply brings within the scope of the powers of the insurance company, property which was not before within its powers to insure because it declares that the railway corporation that is made liable for loss has an insurable interest and the insurance company, by virtue of its charter, may insure where an insurable interest exists. Take this case: Suppose the law were changed in Ontario, and it were declared that all railways having a charter from the Province had an insurable interest in property along their line, could it be said that in such a case an insurance company, which could not before the Act take such a risk, would not, on the amendment of the law, be entitled to take it; and does it make any difference that the law passed declaring the interest insurable is that of a foreign state where the property is situated? I think not. See Lindley's Law of Companies, 6th ed., p. 1226.

The defendants issued a policy upon such property as they might insure in which the plaintiffs had an insurable interest, and although that property happens to be in the State of Maine and the interest is made insurable by the statute of that State, I am of opinion that the policy is a valid policy and covers the risk intended to be covered as evidenced by the policy of insurance in question.

The plaintiffs called one witness who was described as insurance commissioner and in the employ of the plaintiffs, who stated that the plaintiffs desired to insure themselves against claims made by the owners of standing timber caused by sparks from the plaintiffs' locomotives, and their liability for said standing timber along their line through the State of Maine is a paramount liability, and he thought in the present case they were insuring against that liability. On cross-examination, however, it appeared that the witness did not see any person connected with the Ottawa Fire Insurance Company in regard to the policy. He simply employed Mr. Whitehead, a broker, who transacted the business with the defendants' agent at Montreal. I do not think evidence of this kind can in any way affect the rights of the parties as evidenced by the written instrument.

The mistake, if there were one, was not mutual, and what the agent who effected the insurance may have thought, cannot be material: Pollock's Law of Contracts, 7th ed., p. 485; *Smith v. Hughes* (1871), L.R. 6 Q.B. 597, *per* Cockburn, C.J., at pp. 603, 607; *per* Hannen, J., at p. 610.

It was further urged that the railway passed through a wooded country where the loss must chiefly be that of standing timber, but upon the trial it was shewn that there was over half a million dollars' worth of property along the line that would fall within the class of property which the defendants might insure under their statutory powers. I think that the policy in question is a valid policy in full force and effect and binding on the defendant company, and that by their policy the plaintiffs have been fully insured and indemnified against claims for loss or damage to such property as the defendants had power to insure.

The action must be dismissed with costs.

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Master and Servant—Servant Engaging in Other Business—Right of Master to Profits—Contract for Exclusive Service—Damages.

A servant who enters into a contract to devote his entire time and attention to the interests of his master, and to engage in no other business, is liable in damages for the breach of that contract; but if he does work in a different capacity, and does not use time which should be devoted to his master's business, or engage in competitive undertakings, he is not liable to pay to his master the earnings or profits received by him in respect of such work. But no servant can be permitted to retain as against his employer profits acquired by engaging, during his term of employment, without his master's consent, in any business which gives him an interest conflicting with his duty to that employer.

Judgment of Idington, J., varied.

AN appeal by the plaintiffs, and a cross-appeal by the defendant, from the judgment at the trial were argued before a Divisional Court, [MEREDITH, C.J.C.P., TEETZEL, and ANGLIN, JJ.] on the 20th of February, 1905. The facts are stated in the judgment, and the line of argument is there indicated.

Aylesworth, K.C., and W. J. Elliott, for the plaintiffs.

Riddell, K.C., and W. T. J. Lee, for the defendant.

March 20. The judgment of the Court was delivered by ANGLIN, J.:—The plaintiffs sue for an account of profits alleged to have been made by the defendant while employed as their advertising manager by devoting to other enterprises time and labour which he had agreed to give to them, and by engaging as principal in competitive business. In the alternative they claim damages for breach by the defendant of his contract for exclusive service. The action was heard before Idington, J., without a jury, at Toronto. The learned Judge held the plaintiffs not entitled to the account of profits which they sought but only to damages and, in the absence of evidence of any substantial loss, he awarded nominal damages of \$5 with costs upon the county court scale, subject to set-off of the difference between high court and county court costs of defence. From this judgment the plaintiffs appeal in regard to the dismissal of their claim for an account, while the defendant cross-appeals

against the holding that he is liable for damages for breach of contract.

The trial Judge found as facts that the defendant in 1889 engaged to devote his entire time and attention to the advertising interests of the plaintiffs and to engage in no other business during the period covered by the agreement then made, that this provision of the original agreement was extended to the continued services of the defendant with the plaintiffs and that the businesses undertaken by the defendant, of which the plaintiffs complain, were carried on by him while he was in their employment upon these terms.

There is ample evidence to support these findings, and I am unable to say that there was any error either in making them, or in holding that the defendant was guilty of a breach of his engagement with the plaintiffs. It follows that the cross-appeal of the defendant fails and must be dismissed with costs.

Such being the nature and the terms of their servant's employment, the plaintiffs claim to be entitled to an account of profits made by him by engaging in work in breach of his agreement with them for exclusive service, on the grounds, first, that the time which he so spent was their time and that they are therefore entitled to his earnings or profits made by using it for his own purposes, and second, that as their servant he was bound to refrain from engaging in any competitive business and that to that extent his relation to them was fiduciary and such as would entitle them to an account of profits made by him in breach of such duty.

Though the defendant was called by counsel, in argument, "the advertising agent" of the plaintiffs, he occupies the position of a servant or employee rather than that of an "agent" in the sense in which that word is generally used.

Counsel for the plaintiffs strongly urged upon us that the profits of which his clients seek an account were made by the defendant out of transactions within the terms of or in the course of or in connection with his employment, within the purview of the line of cases which requires agents to account for secret commissions and other profits and advantages derived by them from the transaction of the business of their principals beyond the remuneration for which they have agreed to render

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their services. I am unable to agree with this contention. On the contrary I think it is absolutely clear that the profits claimed by these plaintiffs were made, if at all, in independent transactions, undertaken by the defendant as principal, and in no wise connected with or arising out of his employment by the plaintiffs,—transactions to which this line of authority has no application.

Speaking with very great respect for the distinguished Court by which *Morison v. Thompson* (1874), L.R. 9 Q.B. 480, was decided, it is not at all clear that the distinction between cases in which the agent or servant has been compelled to disgorge profits made out of his employment and those in which the servant's earnings from entirely independent employment have been held to belong to the master, was there given the consideration to which it is entitled. In the judgment of the Lord Chief Justice both classes of cases are discussed. The essential difference in the principles upon which the decisions rest is not adverted to. It should be noted that even in the former class of cases the liability of the agent to account to his principal is for money had and received,—a contractual obligation to account for and pay over to the principal everything received beyond the stipulated remuneration, the relation between them being that of debtor and creditor and not that of trustee and *cestui que trust*: *Lister v. Stubbs* (1890), 45 Ch. D. 1; *Powell & Thomas v. Evan Jones & Co.*, [1905] 1 K.B. 11. In this aspect there is some resemblance between them. But otherwise the difference between the two classes of cases is very marked.

In support of the contention that the employer is entitled to the earnings of his servant acquired from other sources in breach of a contract for exclusive service, reliance is placed upon such cases as *Thompson v. Havelock* (1808), 1 Camp. 527, where an employer was held entitled to retain as against his servant the earnings of the latter paid to him by one who had employed the servant. No doubt the rights of the master over the person as well as the time and labour of his servant were much more extensive formerly than they are to-day. Many of those rights which arose out of the feudal system of villenage are inconsistent with modern ideas of human liberty and the inalienable freedom of citizenship. To apply in its pristine force

even to the menial servant of the present day the maxim *quicquid acquiritur servo acquiritur domino*, would shock the twentieth century mind. This rule of law, though extended to the earnings of apprentices in many old cases (and upon principle it is in this connection impossible to draw any sound distinction between apprentices and servants), can have but a limited application to the present-day relations between master and servant: *Jones v. Linde British Refrigeration Co.* (1901), 2 O.L.R. 428, at p. 432, *per* Moss, J.A. There is no question here of the master's right to an injunction restraining breach by his servant of a negative covenant against engaging in any business except that of such master, nor of his right to damages for breach of such covenant.

It is important to note that there are two distinct covenants made by this defendant: (a) that he will devote his entire time to the advertising interests of the plaintiff company; (b) that he will engage in no other line of business during the term of his employment by the plaintiff. The latter negative covenant cannot be construed as expressing or implying a contract by the defendant that if he does engage in any other business than that of the plaintiffs he will do so in their interests and for their benefit. It is because such is deemed to be the positive engagement of a member of a partnership in regard to business within the scope of the partnership undertaking that he is held accountable for any profits made by him out of any such business in which he becomes interested. Although a partner has covenanted not to engage in any other business except upon the account and for the benefit of the partnership, he is not deemed to have thereby agreed to put into the partnership profits which he may acquire from a non-competitive business, though by reason of engaging in that business he may be guilty of a breach of such covenant: *Dean v. McDowell* (1878), 8 Ch. D. 345, at p. 353. The implication, in the case of a partner, of a covenant to do for the partnership all business within its scope in which he may engage is not, in my opinion, to be extended to the case of a servant or agent, though he has promised to give to a particular undertaking of his employer exclusive service. It is a covenant implied from the nature of the partnership contract which is in substance that the partners will do

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that class of business which is within the partnership undertaking for the partnership. The contract of the agent or servant is merely to do his employer's business for his employer's benefit. He may violate his contract, express, or implied, not to engage in any other business, or to devote his whole time and attention to his master's work, by undertaking other employment, but it is quite another thing to say that he must be deemed to have agreed that if he does other business than that of his employer it shall be on his employer's account or for his benefit. The right of the employer to the earnings or profits derived from such extraneous employment of his servant must, if it exists, rest upon something other than such an implied agreement on the part of the servant.

The covenant of an employee to devote his entire time to the undertaking of his employer must, moreover, receive a reasonable construction. It cannot, for instance, be deemed to require that the employee should give to the service hours of the day or night usually devoted to rest and recreation. It does impose upon him an obligation to employ diligently, in advancing that undertaking or business of his principal to which he has agreed to devote himself, during such hours as it is customary for men in positions such as his to work, all the time and ability he can bestow advantageously to his principal. Even during those hours of the day usually devoted to work of the kind for which he is engaged, the servant is not obliged by such a covenant to sit in idleness. *Nemo tenetur ad inutilia*. If he is unable to utilize his time for the benefit and advantage of his employer at that for which he is employed, he may, without becoming liable to account for benefits so acquired, make other use of it not inconsistent with the discharge of the duties to his employer which he has undertaken. To hold otherwise would be in effect to place the employee of the present day in a position little, if at all, better than that of the villein of former times. "A paid agent is bound to discharge all those duties, multifarious or otherwise, and onerous or otherwise, which the terms of that agency cover. . . . If he is called upon to do anything outside the terms of his agency, he is entitled to make a special bargain, or he can decline to do it unless he is remunerated on a special footing:" *Williamson v. Hine*, [1891] 1 Ch. 390, at p. 393.

Changing the terms "agent" and "agency" to "servant" and "service" this proposition of law is equally sound. If the agent or servant undertakes in that capacity work outside the scope of his employment, his principal or master is, if he wishes to take them, entitled to earnings or profits so made. The only right which the servant or agent can have against his master is a possible claim for extra remuneration. But if he neither uses time which belongs to his employer nor engages in competitive undertakings, an agent or servant doing work in some other capacity is not accountable to his employer for his earnings from such work: *Jones v. Linde British Refrigeration Co.*, 2 O.L.R. 428.

Subject to what is said below as to competitive or rival business, even though he has promised to devote all his time and attention to a definite undertaking of his employer which he has been engaged to promote, a servant is not in my opinion bound to account to his master for profits or earnings made by devoting to other affairs time and energy that he has not agreed to devote to, or that could not be usefully expended upon the master's undertaking. In other words, upon such a contract, fairly and reasonably construed, the servant's spare time is his own: *Wallace v. De Young* (1881), 98 Ill. 638. But if he employs for his own purposes portions of the day usually devoted to such business as that for which he has been engaged, the onus is certainly upon him to furnish convincing proof that the time so spent was not required for and could not have been profitably used in that business of his master which has been entrusted to him.

Putting aside, therefore, the expenditure of spare time in non-competitive business, two questions remain for solution. If the servant, without his employer's consent, devotes to his own purposes time which he should, under his agreement fairly construed, have given to the service of his employer, is the latter entitled to earnings or profits so acquired? If the servant devote only his spare time to a rival or competitive business, is the master entitled to an account of the earnings or profits which he so makes?

If the master is so entitled, in the former case, it must be because the time and labour expended by the servant is to be regarded as the master's property, and the earnings and profits

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as the value or proceeds of that property, converted by the servant to his own use and sold for money which in his hands is to be deemed money had and received to the use of his master. Such is the doctrine of the old decisions: *Lightly v. Clouston*, (1808), 1 Taunt. 112; *Foster v. Stewart* (1814), 3 M. & S. 191; *Barber v. Dennis* (1703), 6 Mod. 69; *Meriton v. Hornsby* (1747), 1 Ves. Sr. 48; *Hill v. Allen* (1747), 1 Ves. Sr. 83. But in a learned note to their edition of Coke upon Littleton, at page 117a, Messrs. Hargrave and Butler, discussing these cases, question the soundness of the principle upon which they proceed, and suggest a distinction between apprentices and other servants. They point out that in *Treswell v. Middleton* (1622), Cro. Jac. 653, the master, suing for work and labour done for another by his servant, failed, because he did not allege that the service was rendered by himself or on his account. They express this view: "Independently too of authority, the master's proper remedy in all cases, except those in which the servant is intentionally employed on his master's account, seems to be an action either against the employer for loss of service, if he knew of the first retainer, or against the servant himself for breach of his contract; such a case rather importing the master's right to damages for injury sustained by the consequences of the second retainer, than a right to the profits accruing from it." But this opinion of these learned editors is discountenanced in *Morison v. Thompson*, L.R. 9 Q.B. 480, where Cockburn, C.J., at page 482, points out that *Treswell v. Middleton* "by no means justifies any doubt as to the right of the master as between him and his servant to the earnings of the latter; and certainly is no authority that, if the earnings had been received by the servant, the master may not sue for them as money received to his use." The learned Chief Justice, at page 483, adds: "Nor are these principles confined to the case of service by apprentices. They apply to all cases of employment as servants or agents," and it is at this point that this judgment becomes unsatisfactory, for his Lordship proceeds: "the profits acquired by the servant or agent in the course of, or in connection with, his service or agency, belonging to the master or principal." This confusion of profits made out of the very employment by the master with earnings acquired outside of such employment I find it difficult to account

for. But there can be no doubt of the intention of the Court to express approval of the doctrine laid down in *Barber v. Dennis*, 6 Mod. 69; *Thompson v. Havelock*, 1 Camp. 527, and similar cases. I find this doctrine enunciated and acted upon in the case of a servant who had engaged for general employment, by the Supreme Court of the State of New York, in *Reynolds v. Roosevelt* (1890), 30 N.Y. State Reporter 369.

I am unable to distinguish profits made by the servant by working on his own account from wages earned by him in the service of another. Neither one nor the other may represent any real damage sustained by the master. As such neither one nor the other can be recoverable by him. As money obtained by the servant by the sale of time and labour which belonged to his master, and, therefore, in contemplation of law, the proceeds of the master's property, his right to follow and demand them may be upheld: *Taylor v. Plumer* (1815), 3 M. & S. 562. I am bound, I think, to hold profits so made by a servant to be in his hands the property of his master for which the servant must account to him.

A careful perusal of the evidence in this case satisfies me not only that the plaintiffs have not shewn that in any of the several outside enterprises in which he was engaged did the defendant expend any portion of the usual business day which he could have used to the advantage of the plaintiffs in the branch or department of their business in which he was employed, but, on the contrary, that the defendant has discharged the burden, which I hold to have been upon him in regard to the ordinary business hours, of proving that he did not utilize for his own purposes any time which fairly belonged to his employers.

Moreover there is, with regard to the posters and the album, "Ocean to Ocean," a very considerable body of evidence to support the finding of the learned trial Judge that the plaintiffs knew of and acquiesced in the defendant's participation in these enterprises. The learned Judge has found otherwise with regard to the publication of the "Élite Directory," and the business of the Press Publishing Company. While a finding in regard to both these ventures similar to that made in respect to the posters and album would not, upon the evidence, seem to

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me at all improper, I am unable to say that the contrary conclusion, supported as it is by some evidence, is erroneous.

But does the fact that the defendant devoted some of his spare time to these enterprises render him liable to account to the plaintiffs for profits so made? It is contended by counsel for the plaintiffs that he is so liable, because the *Élite* Directory and the Newspaper Reference Book were undertakings which competed with those of the plaintiffs and gave to their proprietors or promoters interests adverse to those of the Sheppard Publishing Company.

If the servant is to be held accountable to his master for profits which he makes, during the term of his employment, by using his spare time in business similar to and, because of its competitive character, likely to be injurious to that of his employer, it must be, as Lord Ellenborough indicated in *Thompson v. Havelock*, 1 Camp. 527, because it is contrary to sound ethics to permit a man to retain profits made out of an undertaking which gives him an interest conflicting with his duty. "No man should be allowed to have an interest against his duty."

It must be in order to discourage such conduct, if the Courts are to award profits so made to the person to whom the adverse interest, assumed in breach of duty, may have been injurious. As an arbitrary rule of law, adopted to ensure, as far as may be, honest observance of their obligations by servants and employees in many matters in which, owing to the impossibility of proving tangible loss as the direct outcome of even a pronounced departure from the line of duty, liability to an action for damages for breach of contract is not a deterrent, and perhaps also designed to compensate in a rough and ready fashion, at the expense of a wrongdoer, losses not capable of specific definition or proof, this is easily understood and cannot be said to be unsatisfactory. The extent to which a servant's zeal for and devotion to the business of his employer is affected by the influence of any adverse interest is necessarily problematical. It would be most dangerous if immunity to the servant were assured by confining the redress of the employer to the recovery by way of damages of compensation for such special loss, or even actual general loss, as he could with any reasonable degree of certainty trace to this cause: *Ratcliffe v. Evans*, [1892]

2 Q.B. 524, at page 528. The contrary view seems to be so opposed to sound principles, that, although we do not find the proposition explicitly formulated in any judicial opinion, I think that we should not hesitate to declare it to be law that no servant can be permitted to retain as against his employer profits acquired by engaging, during his term of employment, without his master's consent, in any business which gives him an interest conflicting with his duty to that employer.

But does the evidence sustain the claim that the defendant has engaged in competitive business? In my opinion the plaintiffs cannot claim to bring the business of the defendant within the rule merely because it may be of a character such as their charter permits them to undertake. Whatever rights they have must be restricted to business similar to and competitive with that in which they are engaged. The only publication or enterprise of the plaintiffs with which it is suggested the venture of the defendant might conflict or compete is the society newspaper, "Saturday Night."

The Newspaper Reference Book, the sole publication of the Press Publishing Company during the period in question, was principally a collection of biographical sketches of prominent Canadian public men, who paid the publishers for inserting such sketches in this book, accompanied by photographs of themselves. The biographical section of the work was preceded by a compendium of "facts and data regarding Canada . . . its resources, commercial development, and prospects." The book, according to its preface, was "presented by the representative men of Canada . . . as a gift to the press of the world." It contained no advertising. How such a publication could compete with or injuriously affect the business of "Saturday Night," as described by the plaintiffs' witnesses, even the ingenuity of the learned counsel for the appellants did not enable him to suggest.

The Élite Directory comprised an alphabetical list of the "society" ladies and gentlemen of the city of Toronto with their addresses and telephone numbers and the ladies' "at home" days. It also included the membership lists of several clubs and the names of the officers of some other organizations. A quantity of advertising matter of a class similar to that which is to be found in the columns of "Saturday Night" is a prominent

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feature of this publication. One or two of these advertisements the defendant canvassed for and obtained. It is true that he has given positive evidence that no advertisement was procured for the book which in the slightest degree interfered with or affected the advertising business of "Saturday Night" and the learned trial Judge has apparently regarded the defendant as a credible and honest man. But if this enterprise was of a character which might compete or interfere with the plaintiffs' business, if its promotion would give to the servant an interest adverse to or conflicting with that of his employer, the servant cannot be heard to allege that it did not in fact entail such interference or that his fidelity to his employer was not thereby affected. The plaintiffs are not required to shew loss or injury to themselves or any neglect or disregard of their interests by the defendant. The Court when satisfied that the servant has assumed a position in which his interest may conflict with his duty will not enter upon an inquiry to determine whether in fact there has been any departure from the strict line of duty or to what extent the fidelity of the servant has been affected. The principle upon which this inquiry is precluded is similar to that enunciated by Chitty, L.J., in *Shipway v. Broadwood*, [1899] 1 Q.B. 369, at page 375, which was the case of an agent accepting a bribe. It is impossible to say that as one of the proprietors of the "Élite Directory," sharing in the profits to be made from the advertising which it contained,—advertising similar to that to be found in "Saturday Night,"—advertising which appealed to a constituency similar to that of "Saturday Night" viewed as a "society journal"—the defendant had not an interest which conflicted with his duty as advertising manager of the plaintiff company. The merchant or professional man who had set aside a certain sum for advertising in the "society" press might not unnaturally be expected to deduct from that sum the cost of the patronage which he gave to the "society" medium, the "Élite Directory," leaving only the balance available for his advertisement in the other similar medium "Saturday Night." It may be that the defendant resisted any such temptation; it may be that he discharged his full duty to the plaintiffs and that their business suffered not at all from any competition by the "Élite Directory." Upon that field of inquiry he may not

ask the Court to enter. For the profits which he made out of this enterprise of a character such that it might compete with the plaintiffs' undertaking, such that it might give him an interest against his duty, he must be held accountable to his employer.

But of what nature is this liability? If it be at common law, the defendant is accountable as for money had and received. The Statute of Limitations would thus be a bar to the plaintiffs' claim, the "Élite Directory" having been published ten years ago. If accountable in equity, it can only be on a fiduciary basis. If the defendant be in any sense a trustee for the plaintiffs of such profits as he made from the publication of the "Élite Directory" the trust is one established by the application of equitable principles to the position of the parties,—one made out by circumstances—and therefore, a constructive trust to the enforcement of which the lapse of time (by analogy to the statute) is a bar.

At the trial the defendant applied for leave to set up a plea of the statute. The learned trial Judge assented to his doing so upon the terms that he should pay "costs upon the higher scale of all the proceedings incidental to the Élite item of the plaintiffs' claim from the date of the filing of the defence to the end of the trial." The statute would, therefore, prevent the plaintiffs recovering profits from this source for which the defendant may be accountable. If there be no such profits, the plaintiffs should not be awarded any costs, and probably should be ordered to pay the costs of the defendant. If upon a reference they should establish that there were profits made by the defendant, it would entitle them not to such profits,—because of the bar of the statute,—but perhaps to costs of the reference and of the action from the time the defence was delivered until the defendant sought leave to plead the Statute of Limitations.

The proper conclusion seems to be to allow the defendant to elect within a fortnight whether he will take a reference to ascertain what profits, if any, he made out of the publication of the "Élite Directory." If he declines such reference, the judgment below will be varied by awarding to the plaintiffs, in addition to the costs which that judgment gives them, the

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difference between costs on the county court scale and costs on the high court scale from the time of delivery of defence down to the time at which the defendant applied for leave to plead the Statute of Limitations. If the defendant takes such reference, this action will be referred to the Master in Ordinary to inquire and report what profits, if any, were made by the defendant out of the publication of the "Elite Directory," and costs of the action and reference will be reserved to this Court until the Master shall have made his report.

In any event there will be no costs of the plaintiffs' appeal to either party.

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[MEREDITH, C.J.C.P.]

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March 31.

Insurance—Life Insurance—Benefit Certificate—Designation of Beneficiary—Trust for “Legal Heirs”—Preferred Beneficiaries—Revocation.

By its beneficiary certificate, bearing date the 12th of September, 1901, a benevolent society agreed to pay \$2,000 to the beneficiary or beneficiaries designated on the certificate, power of revocation and substitution being reserved to the member. By an endorsement made in the same month the member directed that payment should be made to three named persons, “executors in trust for legal heirs,” reserving power of revocation and substitution. Two years later the member, by instrument in writing identifying the certificate, directed that the moneys payable under it should be paid to his daughter-in-law, and by his will, made about the same time, he also assumed to dispose of the moneys in her favour. The member died in May, 1904, leaving him surviving a grandson, the daughter-in-law, and several brothers and sisters:—

Held, that a designation of “legal heirs” as beneficiaries, although these legal heirs may in fact be members of the preferred class of beneficiaries, does not come within sub-sec. 1 of sec. 159 of the Insurance Act; that the declaration was revocable, and had been revoked; and that the grandson, who claimed as “legal heir,” was not entitled to the fund.

MOTION to determine the persons entitled to the money payable under a benefit certificate issued by the Royal Templars of Temperance to one Arthur Farley, argued before MEREDITH, C.J.C.P., on the 20th of March, 1905. The facts are stated in the judgment.

H. E. Rose, for the trustees Peagam *et al.*

W. R. Riddell, K.C., for the claimant, John A. Farley.

A. Hoskin, K.C., for the claimant, Mary L. Farley.

March 31. MEREDITH, C.J.:—Arthur Farley was in his lifetime and at the time of his death, which occurred on the 15th of May, 1904, a select member of the Royal Templars of Temperance, and by a life insurance certificate, dated the 12th of September, 1901, the Dominion Council of Canada and Newfoundland of the Order agreed, upon the death and age of the member being first established to the satisfaction of the Council, to pay, as on a contract of life insurance for thirty days renewable by the assured as provided in the constitution and laws of the order, to the beneficiary or beneficiaries designated on the certificate “(the said member reserving the power of revocation

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The claim under the certificate being admitted, the society paid into Court the \$2,000 which became payable upon the death of the assured.

The assured left surviving him but one lineal descendant, the claimant, John Arthur Farley, who is his grandson; several brothers and sisters of the deceased also survived him, as did the claimant, Mary Lawson Farley, who is the widow of his deceased son William W. Farley.

By an endorsement on the certificate, which is without date, but is said to have been made in September, 1901, the assured declared that the mortuary benefit under the certificate should be paid to "Harold E. Peagam, R. S. Dinnick and William F. Farley, executors in trust for legal heirs," reserving to himself "power of revocation and substitution of other beneficiaries in accordance with the provisions of the constitution and laws of the order."

The assured subsequently executed an instrument in the following form:—"Toronto, November , 1903. I, Arthur Farley, hereby declare that the moneys payable under the benefit certificate upon my life issued to me by the Royal Templars of Temperance of which I am a member, shall be paid to my daughter-in-law Mary Lawson Farley for her own use and benefit.

Arthur Farley.

Witness, Thomas Wylie."

The assured made his last will and testament, bearing date the 5th of October, 1903, whereof he appointed his daughter-in-law Mary Lawson Farley, his executrix, and by it he assumed to dispose of the money payable under the certificate or the greater part of it, for her benefit.

John Arthur Farley claims to be entitled to the whole fund, his contention being that the declaration endorsed upon the certificate had the effect of making him, in the events that have happened, the sole beneficiary under it, and that being, as it is said he is, of the "preferred class," and of one of the classes of persons mentioned in sub-sec. 1 of sec. 159 of the Ontario Insurance Act (R.S.O. 1897, ch. 203) the declaration in his favour

was an irrevocable one and the subsequent declarations which the assured assumed to make were of no effect.

But for the decided cases to the contrary, I should have thought that there is nothing in sub-sec. 1 of sec. 159 to prevent the assured from reserving to himself the right to revoke a declaration which he makes in favour of a beneficiary coming within any of the classes mentioned in the sub-section.

The provision of the sub-section is that the declaration shall create a trust "in favour of the said beneficiary or beneficiaries according to the intent so expressed or declared, and so long as any object of the trust remains. . . ."

If the condition which the assured has imposed or the power of revocation which he has reserved is disregarded, I do not see how it can be said that the trust is treated as one in favour of the beneficiary or beneficiaries *according to the intent expressed or declared in the declaration*, for where the assured has made a declaration in favour of a member of any of the classes mentioned in the sub-section, reserving to himself the right to revoke the trust thereby created, to hold that he may not exercise the power of revocation, as it appears to me, is not to give effect to the trust according to the intent expressed or declared but the contrary. The decided cases, however, make it impossible for me to give effect to my own view: *Mingeaud v. Packer* (1891), 21 O.R. 267; (1892), 19 A.R. 290; *Re Harrison* (1899), 31 O.R. 314; *Lints v. Lints* (1903), 6 O.L.R. 100; *Fisher v. Fisher* (1898), 25 A.R. 108.

If then the declaration in favour of Peagam, Dinnick and Farley, "executors in trust for legal heirs," because in the events that have happened the grandson John Arthur Farley is the person who answers the description "legal heirs" operates as a declaration in favour of the grandson within the meaning of sub-sec. 1, I am bound to hold that it was not revoked or affected by the subsequent declarations of the assured assuming to declare other and different trusts of the moneys payable under the contract of insurance.

I have, with some hesitation, reached the conclusion that the declaration is one not operating under sub-section 1.

It was held by Ferguson, J., in *Mearns v. Ancient Order of United Workmen* (1892), 22 O.R. 34, that where the benefit

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certificate is declared to be payable to the "legal heirs" of the member, in the absence of anything in the context to shew that the words "legal heirs" were used in a different sense, the heirs at law of the member take as *personæ designatæ*.

After that decision, and in all probability in consequence of it, the Ontario Insurance Act was amended by the addition of what is now sub-sec. 36 of sec. 2 of R.S.O. 1897, ch. 203, which provides as follows: "In insurance of the person the phrase 'legal heirs' or 'lawful heirs' shall mean and include all the lawful surviving children of the assured, and also the wife or husband if surviving the assured; or, where the assured died without lawful surviving children and unmarried, it shall mean those persons entitled to take according to the Statute of Distributions."

This provision is, I think, applicable to a declaration by the assured, though not embodied in the contract of insurance itself, and if there has been no valid revocation of the declaration in favour of the "legal heirs" of the assured, the grandson John Arthur Farley is therefore the beneficiary entitled under the certificate to the whole fund.

The declaration read with the interpretation section is one in favour of Peagam, Dinnick and Farley, executors, in trust for the lawful surviving children of the assured, and also for his wife, if she should survive him and for the persons entitled to take according to the Statute of Distributions, if the assured should die without lawful surviving children and unmarried.

Although in the events that have happened John Arthur Farley is the person entitled to take, I do not think that the declaration is one in favour of a grandson of the assured within the meaning of sub-sec. 1.

What I understand is meant by sub-sec. 1 is that where the assured has selected husband, wife, children, grandchildren, or mother, or any or all of them, to be the beneficiary or beneficiaries, and has so declared in the manner provided by the subsection, a trust is thereby created in their favour, irrevocable as long as any object of the trust remains; but I see no reason for holding that where, as in this case, the assured has named as beneficiaries members of certain of these classes and has provided that if none of them survives him the persons entitled to take

according to the Statute of Distributions are to be the beneficiaries, the persons who take under this latter description, though they may be of the class or classes mentioned in subsec. 1, are to be treated as if they had been designated by reference to them as members of the class to which they happen to belong. The assured in such a case, as it appears to me, has in view as the beneficiaries whom he desires to prefer, his wife and children, and, failing these, is content that the persons who, according to law, become entitled to his personal estate shall take, whoever they may happen to be.

This view is, I think, strengthened by the classification in the Act of beneficiaries as "preferred beneficiaries" and "ordinary beneficiaries:" sec. 2 (35), sec. 159 (1); the husband, wife, children, grandchildren, and mother of the assured constituting the former, and all other beneficiaries the latter class, and, as I have said, a declaration in favour of such persons as may be entitled to take according to the Statute of Distributions, as it appears to me, is not a designation as a preferred beneficiary of the person who is entitled to take, though he may happen to be a member of one of the classes who are called "preferred beneficiaries."

As I understand what was decided by my late brother Lount, in *Re Duncombe* (1902), 3 O.L.R. 510, he was of the same opinion as that which I have just expressed: see pp. 511, 512.

I come therefore to the conclusion that the declaration of September, 1901, was revocable and was revoked, and that John Arthur Farley is not entitled to the fund.

The costs of all parties should, I think, be paid out of the fund.

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[IN THE COURT OF APPEAL.]

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April 4.

GIBB V. McMAHON.

Trusts and Trustees—Sale of Land—Majority of Trustees—Specific Performance.

Land was vested in three trustees in trust to sell at any time in their discretion. All three were willing to accept an offer which had been made, but while this offer was open, and within a week, two of the trustees, in the name of all, accepted another offer for a considerably larger sum from another person, without, as was held on the evidence, giving the third an opportunity of considering this offer, and without authority from him to accept it:—

Held, that the two trustees could not bind the third, and that the second proposed purchaser could not obtain specific performance.
Judgment of a Divisional Court reversed.

AN appeal by the defendants from the judgment in favour of the plaintiff of a Divisional Court [BOYD, C., MEREDITH, and ANGLIN, JJ.], reversing the judgment of STREET, J., at the trial, in an action for specific performance of a contract to sell certain hotel property, was argued before MOSS, C.J.O., OSLER, MACLENNAN, GARROW and MACLAREN, JJ.A., on the 25th and 26th January, 1905.

Delamere, K.C., and *Aylesworth*, K.C., for the appellants.

Ritchie, K.C., and *H. M. Ludwig*, for the respondent.

April 4. The judgment of the Court, in which the facts are stated, was delivered by MACLENNAN, J.A.:—The defendants are trustees of the property in question, which is freehold, under the will of Mary Furlong, deceased, who died on the 12th of February, 1895. The defendants McMahon and William Walsh and her son William Furlong were appointed executors and trustees by a codicil to the will. Furlong having died, the defendant Louis R. Walsh was appointed trustee in his place, under a power contained in the will; and the trust estate was conveyed so as to become vested in the three defendants upon the trusts of the will.

By the will four-thirteenths of her estate were given to her son William, and three-thirteenths to each of three grandchildren, to be sold and distributed by the trustees at the expiration of ten years; and if her son died before the time for distribution without leaving descendants his share was to be

divided between her grandchildren. The trustees were also to be guardians of the grandchildren, and notwithstanding the postponement of the distribution, express power was given to the trustees to sell the property at any time in their discretion.

In the year 1903, although the ten years from the death of the testatrix had not expired, it was considered expedient to sell the hotel property, and it was advertised, but only one offer appears to have been received.

The defendants McMahon and William Walsh resided in Toronto and the other trustee, the defendant Louis R. Walsh, resided at St. Mary's.

On the 1st of September, 1903, McMahon wrote a letter to Louis R. Walsh at St. Mary's on the subject of the sale of the property. He tells him of the advertisement offering it for sale and that only one offer had been received, namely from one Hammall, the lessee, who had offered \$11,500, but was willing to give \$12,000. He says that he and William Walsh thought it wise to sell now, and gives various reasons for doing so, and then adds these words, "Will you kindly let me know your opinion at once? Are you willing that we should accept \$12,000?" On receiving this letter Louis R. Walsh applied his mind to the subject, conferred with a person who he thought might be willing to become a purchaser and on the 7th of September answered, saying he thought "it would be wise to accept Hammall's offer," and giving some reasons for so thinking. He also adds: "Under the circumstances I think it would be better to accept."

There was no further communication between Louis R. Walsh and his co-trustees.

Presumably McMahon received this letter on the 8th of September, but he did not then close with Hammall. That must have been because he thought it was proper and his duty to take more time. He had had enquiries from A. C. Macdonnell on the 4th after his letter to Louis R. Walsh, and later enquiries from another firm of solicitors, to whom he named the sum of \$13,000 as a price. Immediately afterwards, upon his own sole judgment, and without consulting either of his co-trustees, he assumed, in the name of all, to make the offer to those solicitors of the 14th of September which is now in ques-

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tion, and which was accepted. I think that was a clear breach of trust. It was a very simple thing to have made the offer subject to the approval of his co-trustees. It was their right to judge and to decide whether a definite offer to accept \$13,000, or any other sum, should be made, if it was thought that Hammall's offer of \$12,000 should not be accepted. It is true that William Walsh did afterwards assent to and approve of the offer when made aware of it. But it is evident that William Walsh was not so free to exercise his judgment as to the price to be asked after the offer had been made in the name of all as he would have been if consulted previously. He in effect consented and approved under pressure, under natural reluctance to disapprove of what his co-trustee had assumed to do.

Pending the correspondence with Louis R. Walsh and up to the 14th of September, the prospects for the sale of the property had improved. The negotiations with Hammall went no further. New enquiries were being made. The situation was quite different from what it was on the 1st of September when Louis R. Walsh was consulted, and there is no pretence that he was consulted afterwards, nor but that when he became aware of what had been done he promptly refused to approve of it or to be bound by it, and the present action was commenced on the 21st of September afterwards.

The sole question is whether this is a valid contract for the sale of the trust estate, and whether the defendants are bound to perform it specifically; and I am clearly of opinion to the contrary, and with great respect that the judgment of the Divisional Court is wrong and should be reversed, and that the judgment of Street, J., at the trial should be restored.

It may be that if immediately upon receiving the letter of the 7th of September McMahon and Walsh had completed a contract with Hammall at \$12,000, and had assumed to sign it on behalf of Louis R. Walsh as well as on their own behalf, and there had been no change of circumstances in the meantime, the *cestuis que trust* would have been bound. I express no final opinion on that point, though as at present advised I think they would not. This is not a case of principal and agent, like *Ireland v. Livingston* (1872), L.R. 5 H. L. 395, cited by the learned

Chancellor, but a case of trustees, selling, not their own property, but the property of their *cestuis que trust*. What Louis R. Walsh was asked for was his opinion, and whether he was willing that they should accept \$12,000. He gives his opinion, and that is all. Authority to sign the contract for him is neither asked for nor given, and up to the moment of signing, or giving express authority to sign, he had the right and power to change his mind.

But however that might have been, that is not this case. A fortnight had elapsed since the circumstances related in McMahon's letter of the 1st of September. Further enquiries for the property had been made; a new customer had been found; a new negotiation had been opened with the prospect of a better price. I think it is plain the *cestuis que trust* had a right to the benefit of Louis R. Walsh's best judgment in the changed situation, before concluding the new contract, and to have that judgment manifested by his signature, either actual or expressly authorized. Nothing is better settled than that where there are several trustees all must act: Lewin on Trusts, 10th ed., p. 278, and cases there cited. And see *Luke v. South Kensington Hotel Co.* (1879), 11 Ch. D. 121, where, in the Court of Appeal, Jessel, M.R. (p. 125) says: "Two out of three trustees have no power to bind *cestuis que trust*. There is no law that I am acquainted with which enables the majority of trustees to bind the minority. The only power to bind is the act of the three, and consequently the act of the two, even if it could bind them by reason of delay or acquiescence, could not bind the trust estate, and therefore in no way was the trust estate bound."

Here the question is whether the estate of the infant *cestuis que trust* is bound by this contract, of which one of the trustees had absolutely no previous knowledge, and which he repudiated as soon as it came to his knowledge, a contract assumed to be signed on his behalf fourteen days after the information given to him, on which he expressed his willingness to sell.

The Courts are extremely careful in enforcing the specific performance of contracts by trustees for the sale of the lands of their *cestuis que trust*, as to which see *Sneesby v. Thorne* (1855),

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7 D.M.&G. 399; *Goodwin v. Fielding* (1853), 4 D.M.&G. 90, and the cases cited in Fry on Specific Performance, 4th ed., pp. 180, 181. In Lewin on Trusts, 10th ed., p. 484, it is laid down that "in no case will the Court enforce the specific performance of a contract which amounts to a breach of trust"; and in Mr. Justice Fry's treatise, at p. 181, it is said that "Even where there is nothing amounting to a distinct breach of trust the Court will be delicate of interfering against trustees; so that where in a contract of sale by them there is any want of business-like character, the Court will not, it seems, interfere unless the price be shewn to be equal to or more than equal to the value of the property."

For these reasons I think the appeal should be allowed, and the judgment of Street, J., restored.

R.S.C.

[IN CHAMBERS.]

TORONTO INDUSTRIAL EXHIBITION ASSOCIATION v. HOUSTON.

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Evidence—Foreign Commission—Interrogatories.

March 24.

There is no power at the instance of the opposite party to strike out or modify interrogatories prepared by the party who has obtained an order for a foreign commission. He may frame them as he pleases, taking the risk of the evidence being rejected in whole or in part by the Judge at the trial.

A MOTION by the defendant to strike out, as leading and irrelevant, some of the interrogatories which the plaintiffs proposed to put to a witness for whose examination on commission they had obtained an order, was argued before the Master in Chambers, on the 23rd of March, 1905.

J. Grayson Smith, for the defendant.

F. R. Mackelcan, for the plaintiffs.

MARCH 24. THE MASTER IN CHAMBERS:—In pursuance of the order made herein by Street, J., as noted in 5 O.W.R. 349, the plaintiffs have delivered their interrogatories to the defendant who has moved against them on various grounds. The plaintiffs object that I at least have no power to deal with interrogatories.

The only Rule dealing with the subject is Con. Rule 503. On this only two cases are to be found in our reports. Neither of these deals directly with the question of jurisdiction. The headnote in *Lockwood v. Bew* (1884), 10 P.R. 655, is likely to mislead unless the report is read.

No authority was cited in support of the motion: against it is the authority of Hume-Williams and Macklin on Evidence on Commission (1903), p. 101, where it is pointed out that great care should be taken in framing interrogatories, for "if the interrogatories contain leading questions, or are immaterial, irrelevant, or otherwise objectionable, the opposite party may object to the answers being received at the trial. It is not the present practice for the Master to consider interrogatories proposed to be administered to witnesses on commission, because the Rules which so provide apply only to interrogatories *inter partes*;

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but the practice seems at one time to have been different." For these reasons it is said to be usual to have interrogatories settled by counsel.

To the same effect is the judgment of Lord Denman, C.J., in *Small v. Nairne* (1849), 13 Q.B. 840, at p. 843. In that case it was said: "The objection to a question as too leading does not, as a matter of law, make the answer to the question inadmissible. It is entirely in the discretion of the Court whether the question is such as to make the answer obtained by it objectionable." These observations coincide with what is laid down in the text-book *supra*, and so too what follows: "It certainly is to be regretted that there is, in practice, no opportunity for making the objection to a leading interrogatory until the trial: but, *when the trial comes on*, and the objection is made, I think the Judge should exercise a discretion." These authorities make it plain that in the absence of express authority there is no power to deal with these interrogatories.

This conclusion is strengthened by the absence of any cases from our own reports.

As it is only within the last twenty years that the use of interrogatories has been given up, it would seem probable that if any jurisdiction to deal with them existed there would have been some decisions to that effect. On the contrary, in the only two reported cases, the attempt to modify them in Chambers was reversed on appeal by Proudfoot, V.-C.

It seems clear that a party examining on interrogatories cannot be interfered with as is sought to be done in this case. If the other side objects to the interrogatories it may be wise to alter them. But a party is not obliged to do so. If he chooses he is free to take his risk of the commission being rejected, either in whole or in part, by the Judge at the trial.

The motion is dismissed, with costs to the plaintiffs in the cause.

R. S. C.

[IN THE COURT OF APPEAL.]

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April 4.

Jury—Inspection of Panel—Criminal Law—R.S.O. 1897, ch. 61, sec. 94.

The restriction imposed by sec. 94 of the Jurors' Act, R.S.O. 1897, ch. 61, upon the disclosure of the names of the jurors and inspection of the panel, applies in criminal proceedings.
Judgment of Street, J., affirmed, Osler, J.A., dissenting.

APPEAL by Frank P. Chantler from the judgment of Street, J.

The appellant having been committed for trial at the General Sessions of the Peace for the county of Middlesex, to be holden on the 14th of June, 1904, upon a charge of receiving stolen goods, his solicitor applied to the sheriff of the county of Middlesex on the 17th of May, 1904, for leave to inspect the petty jury panel for the said sessions. The solicitor filed with the sheriff at the time an affidavit made by the appellant setting out the general nature of the charges against him and the fact of his commitment and containing the following clauses: "I desire to examine the names of the jury drafted for the panel for the said sessions to be so held as aforesaid in order to determine whether a special jury shall be struck in such charges. The examination of the names of the said jury is not desired and will not be used for any other purpose save as aforesaid." The sheriff refused the application on the ground that a special jury could not be obtained for the trial of the offence with which the appellant was charged, and that therefore inspection of the panel for that purpose was not necessary.

The appellant's solicitor thereupon on the 21st of May again made application to the sheriff in writing for leave to inspect the panel on the grounds that the appellant was "entitled to know the standing of every jurymen, and with this end in view to have thorough and legitimate inquiries made, and that the six days allowed by sec. 94 of the Jurors' Act was not sufficient for the purpose." The sheriff again refused the application, stating that he had no discretion in the matter, and must abide by the provisions of that section.

The appellant then moved on notice to the sheriff and to the Minister of Justice and the Attorney-General of Ontario for

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a mandatory order directing the sheriff to produce and shew to the appellant or his solicitor or agent the panel of jurors drafted for the General Sessions in question, and in support of the application there was filed an affidavit by the appellant stating that he desired personally or through his solicitor to inspect the petty jury panel "for the purpose of being in a position to make all proper and legitimate inquiries with a view of exercising my right of challenge for cause, and the time allowed by statute is not sufficient for the purpose, and for the additional purpose of determining whether a special jury shall be struck."

The application was heard before Street, J., on the 6th of June, 1904, and was refused with costs.

The appeal was argued before OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A., on the 13th of December, 1904.

Arnoldi, K.C., for the appellant. By C.S.U.C. ch. 31, sec. 85, it was provided that each of the copies of the jury panel which the sheriff was required to furnish to the clerk of the peace and to the deputy clerk of the Crown, as well as the jurors' book, should at all reasonable times be open to inspection by litigants or their professional agents without fee or reward. It is clear from a perusal of the other provisions of the Act that "litigant" was intended to include a person accused of a criminal charge as well as a party to a civil proceeding. The same provision was carried into the revisions of 1877 and 1887, but by a statute passed in 1895, 58 Vict. ch. 15, sec. 3, the Provincial Legislature purported to change the law in this respect by providing that the names of the jury drafted for any panel should be kept by the sheriff under lock and key except when an examination thereof is required for the purpose of deciding whether a special jury should be struck. It is submitted that this amending section is *ultra vires*. The granting or withholding of a right of inspection in criminal matters is a matter of procedure and within the exclusive jurisdiction of Parliament; *Regina v. O'Rourke* (1882) 32 C.P. 388, 1 O.R. 464. The inspection of the panel is not a matter relating to the organization of the Court, and in that regard within the jurisdiction of the Province. Organization

ceased with the selection of the panel. The jurors selected became at once by virtue of that selection the jurors who were to serve in the Court in question, and nothing further was necessary to complete the organization of the Court for the purpose of the trial except to have them sworn as jurors when called. If the Act of 1895 is valid at all it is valid only in so far as it may be held to apply to civil proceedings, and the provisions of the Consolidated Statute must be held to be still in force as far as the rights of any person accused of a crime are concerned. It is apparent from the provisions of the Criminal Code that a challenge of jurors for cause is a matter of procedure, and it necessarily follows that the right to ascertain the facts upon which to ground a challenge is also a matter of procedure, and consequently within the jurisdiction of Parliament. If the Provincial Legislature has power to direct the jurors' list to be kept from the public until six days before the trial, it would have power also to direct that the jurors' lists should be concealed until the very moment of the trial, and in that way to render the right of challenge for cause useless. It is impossible within six days to make satisfactory inquiry into the standing of each of the jurors chosen, taken as they are from one end to another of the whole county. The object of the section in question no doubt is to prevent the jury being improperly influenced or tampered with. That, however, is an indictable offence, and has been dealt with as such in the Criminal Code, and by the enactment in question the Provincial Legislature has indirectly attempted to deal with that offence, a thing which clearly it has no power to do.

J. R. Cartwright, K.C., for the Attorney-General of Ontario. The Consolidated Statute referred to on behalf of the appellant has not the wide meaning contended for. A person accused of a crime is not a litigant within the meaning of that statute, and it is only in favour of a party to a civil proceeding that the right of inspection was given. It is quite clear that there was no general right of inspection on behalf of a person accused of a crime: *Regina v. Maguire* (1887), 13 Que. L.R. 96. The selection of jurors and the mode of dealing with the lists are matters entirely within the jurisdiction of the Province, being essential steps in the constitution of the Court. The Provincial

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lists are adopted by the Dominion Parliament for the purpose of criminal trials, but it is only when the trial actually begins that the jurors come, so to speak, under the jurisdiction of the Dominion Parliament, and it is only as to the course of the trial and the right of challenge and things of that sort that the jurisdiction of the Dominion attaches. It may also fairly be contended that the selection of jurors and the control of the lists are matters connected with the administration of justice, and so also in that regard within Provincial jurisdiction. It may be noted also that the sections of the Consolidated Statute relied on by the appellant are in the appendix to the Revised Statutes of Canada, 1886, p. 2324, referred to as "Provincial."

Arnoldi, in reply.

The Minister of Justice was not represented.

April 4. OSLER, J.A.:—The question presented by this appeal is one of some importance, namely, the power of the Provincial Legislature to regulate or control the inspection of the jurors' book or jury panel so far as the same relates to criminal causes or matters.

The right to inspect the jury panel or to have a copy of it depends entirely on statute. There was no such right at common law: Lord Preston's Case (1691), 12 Howell's State Trials, at pp. 665-6; *Regina v. Dowling* (1848), 3 Cox C.C. 509; *Regina v. Maguire*, 13 Que. L.R. 96; though by the indulgence of the Court it was usual to allow the accused to have a copy after he had pleaded. A qualified right was conferred in cases of treason and misprision of treason by 7 Wm. III. ch. 3; and 7 Anne ch. 21; 1 East Pleas of the Crown, pp. 111, 112; Foster's Crown Law, p. 228, and so the law appears to have stood with us until 1850, when the Upper Canada Jurors' Act was passed, 13 & 14 Vict. ch. 55, which is the foundation of our present system. The preamble declared that it was expedient to introduce such a system for the selection and return of jurors as should better secure public confidence in the impartial administration of justice in the trial by jury.

By this Act provision was made for the preparation of a jurors' book made up from the reports of the selectors of jurors in the different municipalities of persons qualified and liable to

serve as jurors. Such book was to contain four rolls in which were entered, (1) grand jurors for the superior Courts of criminal jurisdiction; (2) grand jurors for inferior Courts of criminal jurisdiction; (3) petit jurors to serve in superior Courts of criminal and civil jurisdiction; and (4) petit jurors for the same purpose in inferior Courts.

From these rolls jury lists were to be prepared containing the names of persons liable to be selected and placed on the panel of jurors to be summoned for a particular Court and from the lists the panel was to be made out in the prescribed manner as required by the *ven. fac. jur.* or precept sent by the Judges to the sheriff. Sec. 27 provided that a copy of the writ or precept with the panel attached should be sent by the sheriff to the office of the clerk of the peace for his county and to each clerk of the Crown and pleas at Toronto, and to the local deputy clerk, "Each of which copies—the section finally enacts—as well as the jurors' book shall at all reasonable times be open to inspection by litigants or their professional agents without fee or reward."

The Act and its amendments were consolidated and recast in 1858 by 22 Vict. ch. 100, which in the following year appeared as C.S.U.C. ch. 31. Sec. 83 of the former Act and sec. 85 of the latter repeat the provision just quoted, which was continued in the same terms in the statute law revisions of 1877 and 1887.

By sec. 94 of the Jurors' Act as it appears in the revision of 1897, ch. 61, taken from 58 Vict. ch. 15, sec. 3, it is now, however, enacted that the names of jurors drafted from the jury lists for any panel shall be kept by the sheriff under lock and key, and, unless required to be examined for the purpose of determining whether a special jury shall be struck, shall not be disclosed except in so far as it may be necessary to do so in order to prepare the lists of the panel and serve the jury summons until six days before the sittings of the Court for which the list has been drafted.

By sec. 95 a copy of the panel and of the writ of *ven. fac. jur.* or precept, upon the authority of which it has been drafted, is to be sent by the sheriff to the clerk of the peace of the proper county; to the central office at Toronto; and to the

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deputy clerk of the Crown or local registrar: and sec. 96 provides that these copies and the jurors' book shall only be examined for the purpose of determining whether a special jury shall be struck, and upon filing with the officer in whose custody they are, the affidavit required by sec. 94.

For the appellant it was argued that the restrictions imposed by secs. 94 and 96 were not applicable to the jury panel in so far as it was for use in criminal causes and matters; that the right of the accused to inspection and examination of such panel was that conferred by C.S.U.C. ch. 31, sec. 85: that this right could not be curtailed by the Provincial Legislature, and that any attempt to do so would be dealing with procedure in criminal matters, which, by the British North America Act, sec. 92, item 27, belongs solely to Parliament. The respondent contended that the original section in the Jurors' Act of 1850 and its successors related only to the rights of litigants in civil cases, and that the sections referred to were within the powers of the local Legislature in all respects as dealing with the administration of justice in the Province.

In *Regina v. O'Rourke*, 32 C.P. 388, it was held that the selection and summoning of jurors were not matters relating to the constitution, maintenance, or organization of Provincial Courts of criminal jurisdiction within sec. 92 (14) of the British North America Act, but came under sec. 91 (27), as matters relating to criminal procedure, and therefore that Parliament had the sole power to legislate in respect thereof.

That was also the opinion of the Court of Queen's Bench when the case came before them on a writ of error; 1 O.R. 464; but in both cases it was also held that Parliament might lawfully enact sec. 44 of the Criminal Procedure Act, 32 & 33 Vict. ch. 29 (D).

It is not necessary to notice the latter part of the section which was dropped on the revision of the statutes, R.S.C. 1886, ch. 174, sec. 160. The remainder is now found in sec. 662 of the Criminal Code under Part 51, Trial, and reads as follows: "Every person qualified and summoned as a grand or petit juror according to the laws in force for the time being in any Province of Canada shall be duly qualified to serve as such juror in criminal cases in that Province." Hagarty, C.J., said (p.

475): "The Dominion Parliament, in this Act, (of 1869) seems clearly to assert its right to deal with the qualifications and selections of jurors as matters within its cognizance, and as pertaining to criminal procedure applicable to all the Provinces. . . . This need not be read as technically a delegation of their own authority, but rather, in the language of Wilson, C.J., (32 C.P. 388), 'an acceptance of the provincial law, and a legislation by relation and reference to that law.'"

It is, however, only to the extent of the qualification and selection and summoning of jurors that Parliament has thus legislated. All the provisions of the jury laws as they may exist from time to time are not adopted.

If the proceedings which result in the preparation of the panel for the trial of criminal causes and matters are matters of criminal procedure, *a fortiori* anything which relates to the right of the accused in respect of the panel itself must be equally so. I suppose it would hardly be contended that it would be within the power of the local Legislature to enact that the panel should not be inspected or the accused entitled to a copy of it until after he had pleaded, or until after the opening of the Court, and the restriction of the right to the period of six days before the sittings is not in the least different in principle.

On this subject there has been no legislation by Parliament either directly or by relation since C.S.U.C. ch. 31, sec. 85, except by sec. 658 of the Code (not referred to on the argument) in which Parliament adopting in substance the provisions of the Acts of William and Anne, plainly asserts its right to deal with the jury panel, and specially provides for the delivery to a person indicted for treason, or for being accessory after the fact to treason, of a copy of the indictment, list of witnesses, and of the panel of the jurors who are to try him, with the names, occupations, and places of abode of the witnesses and jurors at least ten days before his arraignment.

This, it appears to me, while making a special provision in favour of persons indicted for treason, etc., leaves sec. 85 of C.S.U.C. ch. 31, in other respects untouched. I think the accused is entitled to inspect the jury panel as provided by that section. His right in this respect has not been and could not be

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restricted or taken away by the local Legislature by secs. 94 and 96 of the present Jurors' Act.

I am unable to understand how a restriction upon the exercises of this right can in any case be regarded as a provision relating to the qualification and summoning or selecting of jurors. These were and are subjects clearly dealt with and regulated in other sections of the Jurors' Acts.

Then as to the respondent's second objection. The operation of the original section is not, in my opinion, confined to litigants in civil cases. It refers to the jurors' book and to the general panel of petit jurors ultimately derived therefrom to serve on the trial both of criminal and civil cases, and it is evident that the word "litigants" must receive its widest meaning when we find sec. 72 speaking of the "trial of issues whether civil or criminal;" and sec. 108, of any defendant, "in any case whether civil or criminal."

I must add that I think Parliament might well adopt the provisions of secs. 94 and 96, or some restriction of a corresponding nature, in the interests of justice and for the prevention of fraud.

I have not overlooked the fact that in appendix No. 1 of the Revised Statutes shewing the history and disposal of the Acts considered by the revisers, sec. 85 of C.S.U.C. ch. 31, is included in that part of the Act which is noted as Provincial, p. 2324. But this appendix forms no part of the Revised Statutes themselves, and cannot be regarded as authoritative.

The appeal should be allowed.

GARROW, J. A. :—I think the judgment of Street, J., refusing a mandamus, should be affirmed.

The appeal is based upon the argument that sec. 85 of C.S.U.C. ch. 31, is still the law in criminal matters, because, being matter of criminal procedure, the Legislature had no power to pass 58 Vict. ch. 15, sec. 3 (O), now R.S.O. 1897, ch. 61, sec. 94. It was long ago determined that Parliament might pass legislation to permit the trial of criminal offences without a jury: *Regina v. Bradshaw* (1876), 38 U.C.R. 564, and it has also been determined that the qualification and mode of selection

of juries for criminal trials are within the exclusive jurisdiction of Parliament: *Regina v. O'Rourke*, 32 C.P. 388, 1 O.R. 464. And it may be conceded that the right of a person charged with a criminal offence to an inspection of the jury panel and to obtain a copy of it falls within these decisions as matter of criminal procedure.

But that is not enough, in my opinion, to enable the applicant to succeed.

Section 85, before referred to, was the law until 58 Vict. ch. 15, sec. 3 (O), was passed. No one will contend that, in so far as jury lists for use in the trials of civil actions are concerned, the change was not within the competency of the Legislature. And there is no provision in the law for the preparation of two lists, one for criminal and the other for civil trials. Parliament has at no time made any special provision upon the subject, but has apparently been content to adopt and to utilize the lists prepared by the local authorities for local purposes within their jurisdiction, the right being, of course, reserved to at any time intervene by legislation if thought necessary. But while using the locally-prepared lists, must they not take them *cum onere* so to speak—that is, with such limitations and conditions as the local Legislature in its wisdom has imposed, such as the secrecy until six days before the sitting of the Court imposed by the statute of 1895 in lieu of the publicity, or, rather, accessibility permitted under the former statute. There is no doubt that the statute of 1895 marked a very distinct change of policy in this respect, doubtless, we must assume, based upon valid reasons. Can it be open to the Dominion Parliament without active interference by legislation to defeat this policy, and to say the lists must be open to inspection in criminal matters whatever may be directed in civil?

I cannot think that such a result was ever intended, nor that it necessarily flows from what has been done in the way of legislation.

In *Regina v. O'Rourke*, 1 O.R. 464, at p. 475, Hagarty, C. J. says: "It seems to me to be very clear that the Dominion Parliament, by this Act of 1869, [Criminal Procedure Act, 32 & 33 Vict. ch. 29, sec. 34], adopted and, as it were, confirmed the

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existing provincial jury laws, and also declared that future provincial laws on that subject should be equally adopted and confirmed, subject, however, to their own right of control by any existing or future Act." And again: "The only question with me is, whether it has clearly sanctioned and adopted the statute law of Ontario, under which the jurors were brought into Court in this case. I think this has been done, and that the Ontario Act must govern so long as the Dominion Parliament has not interposed or enacted any provision inconsistent therewith." This language by an eminent Judge was used as far back as 1882, and, it is to be assumed, was known in Parliament as well as elsewhere.

Since then, after various amendments to the criminal law in other respects, including the revision of 1886, the Criminal Code, 1892, was passed. And by this code a somewhat elaborate procedure was enacted apparently aiming to be as far as possible inclusive, and yet, while it deals with many similar provisions, it makes none upon the subject in question. See sec. 654 as to copy of indictment; sec. 653, right to inspect depositions; sec. 655, right to a copy of depositions, etc., etc.; and not only is there this negative testimony as to intention, but there is also the opposite in the provisions of sec. 658, which provides that in the case of any one indicted for treason, etc., he shall have delivered to him at least ten days before his arraignment . . . a copy of the panel of the jurors who are to try him.

The well-known maxim *expressio unius est exclusio alterius* might well, it seems to me, be invoked against the appellant's present argument.

And it is of some moment as indicating the view of the Dominion authorities that the learned commissioners for the revision of the Dominion Statutes (revision of 1886) treat sec. 85 before mentioned as Provincial. See appendix 1 to R.S.C. 1886, vol. 2, at page 6.

Then, in view of all these circumstances, it will be well to look closely at the exact language used in the Code to see if there is anything to lead to a contrary conclusion. The section adopting the local lists is 662, which enacts that "every person *qualified* and summoned as a grand or petit juror according to the laws in force for the time being in any Province of Canada

shall be duly qualified to serve as such juror in criminal cases in that Province." This language is far from adopting as stereotyped the statute law as it stood at Confederation or at any other time, and is even more explicit than the provisions contained in 32 & 33 Vict. ch. 29, which was the law when the language which I have before quoted was used by Hagarty, C.J., and, so far from leading to a contrary conclusion, seems to me, in reasonably explicit terms, in view of all the circumstances, to prescribe the same conditions in all particulars for the qualification of a juror in criminal matters as must be possessed by a juror in civil matters, one of which is that his name, after he has been drafted for any panel in the manner pointed out by the Act, [R.S.O. 1897, ch. 61] shall be kept by the sheriff under lock and key, subject to the exception in the case of a special jury being required (see sec. 94), until six days before the sittings of the Court for which the list has been drafted.

The appeal should, I think, be dismissed with costs.

MACLENNAN, and MACLAREN, JJ.A., concurred with GARROW, J.A.

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[DIVISIONAL COURT.]

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HENDERSON V. STATE LIFE INSURANCE CO.

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March 31.

Life Insurance—Application for—Withdrawal before Acceptance—Contract—Recovery of Premium.

The plaintiff signed an application to the defendant company for an insurance on his life and paid the first year's premium. In the premium receipt the following words were printed: "The insurance will be in force from the date of approval of the application by the medical director," and the application contained statements of the payment of the premium, and that a receipt had been furnished "to make the insurance . . . binding from the date of approval by the company's medical director," and that the contract should not take effect until accepted by the head office. Before the approval of the application by the medical director the plaintiff withdrew the application:—

Held, that what took place was a mere offer of a risk on the plaintiff's life and that he was entitled to withdraw it and to recover the premium paid. Judgment of the county court of Wentworth affirmed.

APPEAL by the defendants from the county court of Wentworth, in an action to recover the amount of a premium for life insurance paid by plaintiff to defendant.

The appeal was argued on the 15th March, 1905, before a Divisional Court, composed of MEREDITH, C.J.C.P., TEETZEL and CLUTE, J.J.

W. H. Hunter, for the appeal. The evidence shews the premium was paid on the 19th of May; that the plaintiff submitted himself for medical examination on the 23rd and that the application and medical report reached the head office on the 29th. The plaintiff wrote to withdraw the application and for his premium on the 1st of June. His letter was received by the company before the application was approved by the medical director. The company subsequently issued the policy, which the plaintiff refused to accept. An agreement for a policy and a contract of insurance are two different matters. Here, there was an agreement that on certain conditions the plaintiff would accept the policy. The offer contained the term that the policy would be in force from *the date of the approval* by the medical director: *Mutual Life Ins. Co. v. Elliott* (Sup. Ct. Texas) (1900), 29 Ins. L.J. 131. The Court will give effect to the contract as evidenced by the application and the receipt. The

plaintiff had no right to withdraw and was bound to accept the policy: *Sun Life Ass. Co. v. Page* (1888), 15 A.R. 704, at p. 709, *per* Burton, J.A.; *Bolton Partners v. Lambert* (1888), 41 Ch. D. 295.

G. H. Levy, contra. The contract was to be the application and the policy. The policy was not issued nor the application approved of as stipulated until after the application was withdrawn, so there was no completed contract. The premium receipt did not bind the company and the agent could not make a binding contract: *The Provident Savings Life Ass. Society of New York v. Mowat* (1902), 32 S.C.R. 147, at pp. 162, 163 and 164; *Johnson v. The G. & G. Flewelling Man. Co.* (1904), 36 New Brunswick R. 397.

Hunter, in reply.

March 31. MEREDITH, C.J.:—This is an appeal by the defendants from the judgment of the county court of the county of Wentworth in favour of the plaintiff, pronounced on the 20th January, 1905, after the trial of the action before the senior Judge sitting without a jury on the 16th December, 1904.

On the 19th May, 1904, the respondent signed a written application to the appellant company for an insurance on his life of \$10,000 and on the same day paid to the local agent of the company \$51.90 and gave him the respondent's promissory note for \$300, the two sums making up the amount of the first annual premium, for which he received the company's receipt, which is in the following words:

"Number 53551

\$351.90

May 19, 1904

THE STATE LIFE INSURANCE COMPANY,

OF INDIANAPOLIS, INDIANA.

The Agent collecting on this Receipt has no authority to collect for more than the first year's premium.

RECEIVED OF Gordon J. Henderson Three hundred and fifty-one and 90/100 Dollars, *in full for the first annual premium on 10,000 thousand dollars insurance. The insurance will be in force from the date of approval of the application by the Medical Director.* In case the policy should not be issued, the

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money paid will be refunded; Provided, a completed application for such insurance is made and submitted to the company, at its Home Office, and that the applicant, if he shall not receive his policy within thirty days from date hereof, shall notify the company.

Meredith, C.J. Not valid unless countersigned by
L. W. MOODY, Agent.

W. S. WYNN,
Secretary."

The promissory note was discounted at the Traders' Bank by the agent and was paid at maturity by the respondent.

On the 1st June, 1904, and before any acceptance by the appellant company of the offer of the respondent, which was contained in the application, the respondent gave notice to the company of the withdrawal of his application and requesting the return of the money he had paid and the promissory note he had given.

The appellant company having refused to comply with his request, the respondent brings this action to recover the amount paid by him to the agent in cash and what he has been compelled to pay to take up his promissory note.

The written application is in form one for a policy of \$10,000 insurance on the life of the respondent upon the twenty payment plan, and among others the following statements are contained in it:

"I have paid \$351.90 to the subscribing soliciting agent and have been furnished with his receipt for the same to make the insurance herein applied for binding from the date of approval by the company's medical director." * * *

"It is hereby agreed that all the foregoing statements and answers and also those I make to the company's medical examiner, which are hereby made a part of this application, are warranted to be full, complete and true and are offered to the company as a consideration for the contract, which shall not take effect until this application, which I agree to complete by submitting to a medical examination, has been accepted by the company at the Home Office in Indianapolis, Indiana, and the first premium shall have been paid and accepted by the company

or an authorized agent during the life and good health of the person herein proposed for insurance."

The written application and the medical examiner's report were transmitted by the local agent to the head office of the company and reached that office on the 31st May, 1904; the acceptance of the application by the medical director took place on the 6th June, 1904, and the acceptance of the risk by the head office of the company on the next day, when, according to the memorandum stamped on the application, the policy was sent out.

I am of opinion that the judgment of the learned Judge of the county court was right and should be affirmed.

I am unable to see anything in the facts and circumstances of the case that precluded the respondent at any time before the acceptance by the appellant company of the risk which he had offered them, from withdrawing his application and thereupon being entitled to be repaid what he had paid in money, and to have the promissory note which he had given returned to him.

It was contended by Mr. Hunter that a contract—not, as he admitted, a contract to insure—had been come to as the result of the application by the respondent, the payment of the \$351.90 and the receipt which was given, which prevented the application from being treated as a mere offer, which might at any time before acceptance be withdrawn by the person making it. What that contract was, the learned counsel found some difficulty in stating, but eventually, I think, he put it that the company had agreed, in consideration of the payment made, that if the medical director should approve of the application, and it should be accepted by the company at the Home Office in Indianapolis, Indiana, the company would insure the respondent, and issue to him its policy in the terms of the application.

I am unable to agree with this contention. I see nothing in the receipt which binds the appellant company to do anything; it is simply an acknowledgment of the payment of the money and a statement that the insurance will be in force from the date of the approval of the application by the medical director, which I take to mean, that if the application is

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accepted by the company at the Home Office, the policy will conform to the application, by making the insurance binding from the date of approval by the company's medical director.

It is also to be observed that it is expressly stated in the printed part of the application that the contract shall not take effect until the application has been accepted by the company at the Home Office in Indianapolis, Indiana.

It appears to me, therefore, that what took place between the parties amounted merely to an offer by the respondent to the appellant company of the risk on his life on the terms mentioned in the application, and the payment by the respondent of the sum required to pay the first premium, to be applied for that purpose, if and when the offer of the respondent should be accepted; and that the appellant company, before the application was withdrawn, had neither accepted the risk nor bound itself to do anything in consideration of what the respondent had done, and in this view of the case it is clear that the judgment of the Court below is right.

The case of *Johnson v. The G. & G. Flewelling Manufacturing Co.*, 36 New Brunswick Reports 397, cited by Mr. Levy, although the facts were not quite the same as those which exist in this case, supports the conclusion to which I have come.

I would affirm the judgment and dismiss the appeal with costs.

TEETZEL and CLUTE, JJ., concurred.

G. A. B.

[DIVISIONAL COURT.]

SLATER V. LABEREE.

D.C.

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April 3.

Division Courts—Jurisdiction—Claim Over \$100—Promissory Note—Endorser.

Having regard to sec. 8, sub-sec. 24, of the Interpretation Act, the word "document" in sec. 1 of 4 Edw. VII., ch. 12, amending sec. 72 of the Division Courts Act, may be read if necessary in the plural, and therefore the increased jurisdiction of the division court may be exercised where the claim can be established by the production of one or more documents and the proof of the signatures to them.

Production of a promissory note and proof of the signature of the defendant as an endorser, and production of the protest setting out the facts of presentment and notice of dishonour, make out a *prima facie* case within the jurisdiction of the division court.
Judgment of Magee, J., reversed.

APPEAL by the plaintiffs from the judgment of Magee, J.

The action was brought in the 1st division court of the county of Carleton against the defendant as endorser of a promissory note to recover from him the amount of the note which was for more than \$100. The defendant contended that he was not an endorser of the note, and that the action was not one within the jurisdiction of the division court, and the junior Judge of the county court before whom the action came on for trial took this view and refused to try the case.

The plaintiffs then applied for a mandatory order to compel him to try the action, and the application was heard by Magee, J., on the 13th of March, 1905, and was refused.

The question involved in this appeal was the meaning of sec. 1 of 4 Edw. VII. ch. 12, amending sec. 72 of the Division Courts Act, R.S.O. 1897, ch. 60. By sec. 72 the division court is given jurisdiction in claims exceeding \$100 and not exceeding \$200 when the amount or the original amount of the claim is ascertained by the signature of the defendant, and by sec. 1 of 4 Edw. VII. ch. 12, it is provided that the amount or original amount of the claim shall not be deemed to be ascertained by the signature of the defendant within the meaning of the section "when in order to establish the claim of the plaintiff or the amount which he is entitled to recover, it is necessary for him to give other and extrinsic evidence beyond the mere production of a document and the proof of the signature to it." The learned

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Judge in the Court below held that the present case could not be tried in the division court because proof of the signature of the defendant as endorser of the note in question was not in itself sufficient, evidence of presentment and of notice of dishonour being required in addition.

The appeal was argued before a Divisional Court [MEREDITH, C.J.C.P., BRITTON, and CLUTE, JJ.], on the 3rd of April, 1905.

W. E. Middleton, for the appellants. The learned Judge has taken too narrow a view of the meaning of the section in question. Prior to its passage there had been a conflict in the decisions as to the meaning of sec. 72 of the Division Courts Act, and as is pointed out in *Re Thom v. McQuitty* (1904), 8 O.L.R. 705, the Act of 1904 is a declaratory Act, adopting the view taken in *Kreutziger v. Brox* (1900), 32 O.R. 418, and it was not intended to narrow the jurisdiction. All that is necessary therefore is that the amount of the claim should be ascertained by the signature of the defendant, and clearly that has been done in the present instance. Ascertainment of amount is what is being dealt with by the section, and it is in that connection that the phrase "establish the claim" is used. Even if, however, the phrase "establish the claim" is used in the wider sense the decision is wrong and the division court has jurisdiction. The word "document" may, having regard to the Interpretation Act, be read in the plural, and therefore any claim of \$200 or less which can be established by the production of any number of documents, and by proof if necessary of the signatures to them, can be tried in the division court. A *prima facie* case was made out in the present instance by the proof of the signature to the note and by the production of the protest, it not even being necessary to prove the signature to the latter document. Clearly, therefore, the division court has jurisdiction and a mandatory order should be made.

A. J. Russell Snow, for the respondent. It was evidently intended by the amending section to limit the jurisdiction of the division court to cases where some one document would if proved establish the whole liability of the defendant. Therefore in this case there is no jurisdiction, for it is necessary to prove in addition to the signature of the defendant the facts of

presentment and notice of dishonour. There is also the special circumstance here that the defendant is not named as payee in the note, and it is contended on his behalf that he put his name on the note before it was endorsed by the payee and therefore that he is not liable as an endorser, but is at most a surety, oral evidence being necessary to make him liable in this respect.

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MEREDITH, C.J. (at the close of the argument):—We have not the benefit of any statement of the reasons of my brother Magee which led him to refuse the mandamus. Perhaps we should refrain from any expression of opinion upon the first question argued by Mr. Middleton, as to whether the language of sec. 1 of 4 Edw. VII. ch. 12, is to be limited to a document necessary to ascertain the amount of the claim, because we think his argument as to the effect of the latter part of the section is entitled to prevail. The language of the section is that the amount or original amount of the claim shall not be deemed to be ascertained when, in order to establish the claim of the plaintiff or the amount which he is entitled to recover, it is necessary for him to give other and extrinsic evidence beyond the mere production of a document and the proof of the signature to it.

In this case—subject to the question which Mr. Snow has raised as to the effect of the position of the respondent's name on the bill, the form of the bill, and his not being the payee and having endorsed it—upon the production of the note and the protest and proof of the signature to the note, the case is made out within the statute. I do not think we should depart from the plain language of the section, which gives jurisdiction where all that is necessary to make out the plaintiff's case is the production of a document and proof of the signature to it.

The language of the statute, I think, warrants the conclusion that where the production of the note and the protest and the proof of the signature would *prima facie* entitle the plaintiff to recover, the case is brought within the jurisdiction of the division court.

It is not for us to determine whether upon proof of the endorsement without more the plaintiff will be entitled to recover. If the plaintiff is not entitled to recover without more

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then, if it should become necessary for the learned Judge to enter upon a further enquiry and to take evidence for the purpose of shewing some ground for making the defendant liable, in all probability his jurisdiction would be ousted and he would be bound to stop the further trial of the action; but upon the first question, that is, whether upon the face of the instrument the defendant is liable, that is for the division court and not for us. We are simply concerned now with the question of jurisdiction.

We think the appeal must be allowed, the order reversed and the mandamus granted as asked. The order must be framed so as to make it clear that we are not directing a trial if extrinsic evidence is necessary in order to make the defendant liable. It must be clear that we are not directing the learned Judge to enter upon an enquiry such as Mr. Snow suggests would be necessary for him to enter upon in order to make the defendant liable.

The costs will follow the result of the appeal.

R.S.C.

[STREET, J.]

LOUNT V. LONDON MUTUAL FIRE INSURANCE CO.

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*Fire Insurance—Variations to the Statutory Conditions—"Just and Reasonable"
—Material to the Risk—Encumbrances—Notice to Local Agent.*

Feb. 22.

A policy provided, by way of variation of statutory condition 1, that any encumbrance by way of mortgage should be deemed material to be known to the company within the meaning of the said statutory condition:—

Held, that this was too wide to be just or reasonable, and that the Court had to determine whether the non-disclosure of the mortgage was a material fact, the onus being on the defendants who asserted its materiality.

By another variation of the statutory conditions it was provided that the words "or its local agent," in the 3rd statutory condition, which provides that any change material to the risk must be notified in writing "to the company or its local agent," were struck out, and that wherever the words "agent" or "authorized agent" occurred elsewhere in the statutory conditions, such "agent" or "authorized agent" should be held to mean the company's secretary only:—

Held, where a company had its head office in Ontario, a valid variation, since it was not unjust or unreasonable to stipulate that notice of important changes in the character of the risk should be communicated to the head office.

Where, in a policy, variations from the statutory conditions were printed in type of the same size and shape as the statutory conditions, but in bright scarlet, whereas the latter were in black ink:—

Held, that the requirements of sec. 169 of the Ontario Insurance Act, R.S.O. 1897, ch. 203, were sufficiently complied with.

THIS was an action upon an insurance policy of the defendants covering machinery in a brush handle factory, and was tried before STREET, J., at the non-jury sittings in Toronto, on February 5th and 7th, 1905.

The circumstances of the case are set out in the judgment.

A. E. H. Creswicke, for the plaintiff, contended that the property insured was chattel property, and that the Button mortgage was in fact not on it, but only on the realty, and therefore the plaintiff had truly disclosed the only encumbrance on the property insured, and that the onus of establishing materiality was on the defendants: *Samo v. Gore District Mutual Fire Ins. Co.* (1877), 1 A.R. 545, at pp. 553, 569; that the non-disclosure of the Button mortgage was, in any event, not a fatal objection in the absence of fraud, and not a breach of the statutory condition: *Klein v. Union Fire Ins. Co.* (1882), 3 O.R. 234; *Ashworth v. Victoria Mutual Ass. Co.* (1870), 20 C.P. 434, at p. 437: *Ottawa Agricultural Ins. Co. v. Sheridan*

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(1880), 5 S.C.R. 158, 171; *Sands v. Standard Ins. Co.* (1878-9), 26 Gr. 113, 27 Gr. 167; *Bull v. North British Canadian Investment Co.* (1888), 15 A.R. 421, at p. 429; that the variations from the statutory conditions were inoperative, as they did not comply with the requirements of secs. 169, 170, 171 of the Insurance Act, R.S.O. 1897, ch. 203; *Ballagh v. Royal Mutual Fire Ins. Co.* (1880), 5 A.R. 87, at pp. 91, 99; *Sly v. Ottawa Agricultural Insurance Co.* (1878), 29 C.P. 28; that the variations were not just or reasonable: *McKay v. Norwich Union Ins. Co.* (1895), 27 O.R. 251, at p. 261; *Smith v. City of London Ins. Co.* (1887), 14 A.R. 328; *Dominion Grange Mutual Fire Ins. Ass. v. Bradt* (1895), 25 S.C.R. 154; *Merchants Fire Ins. Co. v. Equity Fire Ins. Co.* (1905), 9 O.L.R. 241; *Parsons v. Queen's Ins. Co.* (1882), 2 O.R. 45; that notice to Johnston, the agent, was sufficient, notwithstanding that the words "or its local agent" were struck out; that he had taken the risk, and afterwards the defendants accepted notice of the fire through him: *Montreal Ass. Co. v. McGillivray* (1859), 13 Moo. P.C. 87, 8 W.R. 165; *Peppit v. North British and Mercantile Ins. Co.* (1879), 1 Russ. & G. (N.S.) 219; Porter's Laws of Insurance, 4th ed., p. 468, and cases there cited.

J. C. Judd and *W. R. Meredith*, for the defendants, contended that the machinery must be assumed from its nature to be a fixture; that the Button mortgage covered it as part of the freehold to the exclusion of the chattel mortgage; that the plaintiff was not the owner of the property insured, and had no insurable interest; that there had been non-disclosure of certain facts material to the risk, which are referred to in the judgment; that notice to the local agent was not sufficient, but under the condition of the policy had to be given to the head office, and that *Ballagh v. Royal Mutual Fire Ins. Co.*, and *McKay v. Norwich Union Ins. Co.*, shewed that the variations in the policy here in question were reasonable, and that the policy was void under the defendants' private Act, 41 Vict. ch. 40, sec. 32, (D.)*

*41 Vict. ch. 40, sec. 32, (D.) is as follows: "If any alteration be made in any house or building insured by the proprietor thereof, or if the risk on any house or building or other property insured be increased by any means whatever after the insurance has been made thereon with the company, whereby it is exposed

February 22. STREET, J.:—This was an action upon an insurance policy of the defendants upon the “machinery, belting, gearing, shafting, all owned by the assured and contained in a three-storey store and frame shingle-roof building used as a brush handle factory, water power only.” The assured is the plaintiff, Abbie E. Lount, and the loss, if any, is made “payable to Mrs. E. Lount, mortgagee, as her interest may appear.” Mrs. E. Lount, the mortgagee, is the mother of the husband of Abbie E. Lount, the plaintiff, and is the defendant, Elizabeth Lount.

The plaintiff’s husband, Mr. E. Lount, and one Taylor formerly owned the property, and on May 24th, 1890, made a chattel mortgage of the machinery to the defendant, Elizabeth Lount. In 1890, after the giving of this chattel mortgage, they became insolvent and made an assignment for the benefit of their creditors, and the present plaintiff became the owner, by purchase from the assignee, of the building and machinery subject to the chattel mortgage. On April 1st, 1892, the plaintiff and her husband mortgaged the property to one Harriet White for \$2,500; that mortgage is still unpaid to the extent of \$600 and it has been assigned to one Button, who holds it now.

On May 24th, 1898, the plaintiff and her husband made a mortgage of the real estate to the defendant, Elizabeth Lount, as collateral security to the chattel mortgage for \$600 which was and still is unpaid.

The plaintiff, Abbie E. Lount, on June 1st, 1901, applied to W. H. Johnston, the local agent of the defendant’s at Whitby, for an insurance of \$600 upon the machinery, belting, gearing, and shafting contained in the mill. In the application the following questions and answers appear:—

“13. Is applicant owner, mortgagee or lessee?” Answer. “Owners.”

(a.) If mortgagee to what amount?” Answer. “\$600.”

“14. If encumbered, state how and to what amount.” Answer. “Mortgaged to Mrs. E. Lount.”

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to greater risk or hazard from fire, than it was when the insurance was effected, the insurance thereon shall be void, unless previous notice thereof be given in writing and the requisite additional premium note or deposit, after such alteration, be given or paid to the directors. . . .”

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Then follows a warranty that the answers are correct answers to the several questions so far as the same are known to the applicant.

The application was forwarded by the local agent to the head office of the company, who approved it and issued their policy dated June 18th, 1901, to the plaintiff, the loss being made payable to Mrs. E. Lount as her interest may appear. Endorsed upon the policy were the statutory conditions with certain variations printed below in red ink. One of the variations was as follows:—"Any encumbrance by way of mortgage . . shall be deemed 'material to be made known to the company' within the provisions of the first statutory condition;" by another variation it is provided that the words 'or its local agent' in the third statutory condition are struck out, and wherever the words "agent" or "authorized agent" occur elsewhere in the said statutory conditions, such agent or authorized agent shall be held to mean the company's secretary only.

At the end of June, 1901, the dam from which the power was obtained gave way and the plaintiff put in a boiler and engine and began to run the mill by steam power on August 1st, having previously notified the local agent by post card of her intentions in that regard. The agent did not forward the post card to the defendants, the company, or in any way notify them of the change. He gives as his reason that the post card stated the proposed change as a temporary measure only, and that he tore up the post card and threw it away. The fire occurred on Saturday night, September 29th, 1901.

The defendants set up various defences, all of which I disposed of at the trial, excepting the following:—

1. That the plaintiff did not disclose to the company in her application or otherwise the existence of the mortgage for \$600 upon the property, held by Button, but disclosed only the \$600 mortgage to the defendant, Elizabeth Lount. They rely upon the first statutory condition which avoids the policy if the assured omits to communicate to the company any circumstance which is material to be made known in order to enable it to judge the risk it undertakes; and they further rely upon the variation of this condition which explicitly declares that

any encumbrance by way of mortgage shall be deemed material to be made known to the company within the provisions of the first statutory provision.

The plaintiff contends that it is a question of fact to be determined by the Court whether the encumbrance was a circumstance material to the risk; that the variations of statutory conditions are not binding because not printed in the manner required by the Act, and that in any event this particular variation was not just and reasonable; and further that the machinery, belting, gearing and shafting had been declared to be chattels by the fact of a chattel mortgage having been made upon them in 1890 by Lount and Taylor, and did not, therefore, pass under the mortgage of the real estate to White; that, this being the case, they were subject only to the chattel mortgage to Elizabeth White for \$600, and the mortgage on the real estate collateral to it.

I think the variations are printed in a manner complying with the Act. The Act requires that they shall be printed in conspicuous type and in ink of a different colour. The object of this requirement is that the fact that they are variations shall be brought prominently to the notice of the assured. The type used is of the same size and shape as that of the statutory conditions; but the printing of the statutory conditions is in black ink, that of the variations is in a bright scarlet. The Act does not in terms require that the type used in the variations shall be of a different size and shape, it only requires that it shall be in some way "conspicuous" besides being in an ink of a different colour. If the statutory conditions were printed in black and the variations in dark blue, the same sized type being used, it might be difficult to say that the type of the variations was sufficiently conspicuous to comply with the statute. Looking, however, at the strong contrast between the black of the statutory conditions and the scarlet of the variations, I find the Act has been complied with in both its requirements by the conspicuous contrast between them.

I think the particular variation which declares that the existence of an encumbrance upon the property is a circumstance material to be made known to the company within the provisions of the first statutory condition, is too wide to be

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treated as a just and reasonable variation of the statutory condition. The existence of a trifling encumbrance upon a valuable property would probably not under ordinary circumstances be a material fact, and yet the proposed variation would invalidate a policy however trifling the encumbrance might be. The statutory condition is broadly fair to both insurer and insured, for it obliges the latter to disclose all facts material to the risk, and leaves to be tried as a matter of fact whether the undisclosed facts are material. The proposed variation seeks to lay down a hard and fast rule, in favour of the insurer, declaring the existence of an undisclosed incumbrance, however small, to be fatal to the validity of the policy. Under the statutory condition I am to determine whether the non-disclosure of the \$600 mortgage held by Button was a material fact, the onus being upon the defendants, who assert its materiality. No evidence was given of the value of the mill which the mortgage covered; no one gave any evidence from which I can judge of the materiality of the circumstance relied on, and I am therefore unable to say that the defendants have made out their defence upon this branch of the case.

2. The next ground of defence is that the plaintiff altered the power used in the mill from water to steam and did not notify the company of the fact. The 3rd statutory condition endorsed on the policy provides that "any change material to the risk . . shall avoid the policy . . unless the change is promptly notified in writing to the company or its local agent; and the company when so notified may return the premium for the unexpired period and cancel the policy," etc. What happened was that the plaintiff notified the local agent in writing of his intention to change the power from water to steam and that the local agent did not forward the notice to the company, but tore it up, so that at the time of the fire the mill was being operated by steam without the knowledge of the defendants, though expressly limited in the policy to "water power only." Evidence was given at the trial that the change from water power to steam power was material to the risk, and that upon a factory operated by steam power the rate was nearly double that upon one operated by water power. By the 3rd variation the words "or its local agent" are struck out from the 3rd

statutory condition so as to require notice of the change to be given to the company. In my opinion this is a just and reasonable variation. This particular company has between 400 and 500 local agents in all. The only evidence of the power or authority of the agents is derived from the evidence of what this particular agent, Johnston, did in the present instance. He was at the same time local agent for the Economical Insurance Co., in which the plaintiff had been insured before the date of the present policy and he changed her, he says, from that company to the defendants' company. He filled up the application, procured her to sign it and forwarded it to the defendants. When the fire occurred he informed the company of it. He does not appear to have had any powers or authorities of a general character, so as to constitute him a general agent of the company for all purposes. The words "local agent" in the statutory conditions may not improbably have been intended to apply to the provincial agents of companies having their head office out of Ontario. Where, however, a company has its head office in the Province and has no general agents away from its head office, but only local agents having the limited duties which Johnston seems to have performed for them, I can see nothing unjust or unreasonable in their stipulating that notice of an important change in the character of the risk should be communicated to their head office, particularly as the 23rd statutory condition permits it to be given by the sending of a registered letter to the head office of the company, and the address for the purpose is printed on the back of the policy. Or, to put it in another way, the statutory condition No. 3 assumes the local agent of the company to have authority, to receive such notices; the company by their variation inform the insured that the local agent has no such authority and that such notices may be sent to them by registered letter as provided by the 23rd statutory condition. I can find no hardship in such a stipulation and I think it a just and reasonable one.

Therefore, I think the plaintiff made a material alteration in the risk by substituting steam for water power; that she did not give notice in writing to the defendants, and that she cannot recover upon this policy.

The action must be dismissed with costs.

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Venue—Place of Trial—All Parties in Same County—Con. Rule 529 (b).

On an equitable construction of Con. Rule 529 (b), where the cause of action has arisen in the county in which all the parties to it who are within the jurisdiction reside, the venue should be in the county town of that county, although there may be other parties who live outside the jurisdiction. Proper principles in respect to change of venue considered. Decision of Meredith, J., reversed.

APPEAL by the defendants to the Divisional Court from an order of Meredith, J., setting aside an order of the Master in Chambers changing the venue from Kingston to Toronto, under the circumstances set out in the judgment of the Divisional Court.

The judgment of Meredith, J., was as follows:—

February 17. MEREDITH, J.:—The Master in Chambers changed the place of trial because he thought some peculiar circumstances of the case warranted it. But I am quite unable to perceive anything peculiar in it, except that one class of witnesses has been favoured, and another class prejudiced, by the order. If the names of the defendants' witnesses had not been disclosed no one could have had any reasonable expectation of a change of the place of trial, by reason merely of the places of residence of the witnesses. The fact that seven reside in Toronto and two in the North-West Territories, whilst five only reside in Kingston, is obviously not a case of preponderance of convenience sufficient to take away the plaintiffs' right of choice of the place of trial: see *Peer v. North-West Transportation Company* (1892), 14 P.R. 381; *Campbell v. Doherty* (1898), 18 P.R. 243; *McDonald v. Dawson* (1904), 3 O.W.R. 773.

I do not assert that the convenience of individual witnesses is never to be taken into account, but I do assert that it is a matter of secondary importance at most; that the paramount considerations are the legal rights of the parties and their

interests. Witnesses owe a duty to truth and justice as well as to the parties to the litigation; and it is not to be forgotten that the witness of to-day may be the litigant of to-morrow, with the litigants of to-day for his witnesses. If the parties agree to an inconvenient place of trial, can it be changed at the instance of a witness? But, dealing with the personal convenience of different classes of witnesses, can it truthfully be said that the professional, political, or mercantile gentleman, stand he ever so high, is entitled to greater consideration than the farmer, the mechanic, or the labourer? My answer is, certainly not; but rather the greater inconvenience generally falls to those of the latter class. Journeying is part of the business, and of the habits, generally speaking, of those of the former class; it has no pains for, and often little inconvenience to, them. It is very different with many of the latter class; to some it may be the first long journey of a life, and they cannot avail themselves of those luxuries (?) of modern journeyings, special, or even ordinary, dining and sleeping cars, and of the advantages of "first-class" hotels. Those of the former class are not likely to suffer "as a stranger in a strange land," nor are their businesses, or their families, likely to be inconvenienced; everything is planned for frequent absence; neither their wives nor their little children are obliged to clear the snow from the public walks, cut the wood and light the fires, attend to the horses and cattle, and do the other daily "chores." I find nothing upon this score which aids the defendants, though every witness who is inconvenienced in doing his duty has my sincerest sympathy. The loss of the poor man's mite, in the performance of his duty as a witness, may be far more to him than the loss of the rich man's pounds, or hundreds of pounds, in the like way, is to him.

Then it was argued that the assertion upon oath that there were five material and necessary witnesses residing in Kingston was not true. But I decline to try a question of false swearing upon mere argument, without the oath of any one, in any manner, denying the assertion as to the five witnesses. The more usual and more proper way of trying a charge of false swearing is in the criminal courts, after those who assert it have had the courage to make a criminal charge. If, upon the trial, there should not be five such witnesses called, and if it

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should appear that a change of venue was prevented by misstatement under oath, the costs can be so dealt with that the party having had the benefit of that misstatement, shall not profit by it. It is always to be borne in mind that the purpose of the action is not to determine accurately where the trial ought to be had, that that is a question of comparative insignificance.

Then it was contended that there would be greater delay awaiting a trial at Kingston than at Toronto. My experience has proved that the opposite contention would be nearer the fact. Naturally the wheels of justice move in a much more leisurely manner "in town." They are set in motion later, and their day's work is done earlier—there are no night sittings. Three to one would probably be the number of cases tried out of Toronto against in Toronto, in the same space of time. Usually there is a short list at Kingston—no city offers a greater advantage in this respect, and also in other respects; the trains run thither conveniently; indeed one might say that the Toronto witnesses could be gathered together almost, if not quite, as conveniently at Kingston as at Toronto. Notified after the day's work is done, they could be all in attendance at the opening of the Court on the following morning; and, after giving the day—for which they are paid—to their duty as witnesses, could be back in Toronto again in good time for the next day's work. Of course it is inconvenient for the professional gentleman to rise and change cars at 3 and 4 o'clock in the morning, but it is quite as inconvenient to the farmer, who may go to bed usually at 9 p.m., to wait up till 2 or 3 o'clock in the morning, and then change cars and take his train for Toronto. But if this was not so, all cases cannot be tried in Toronto, because of its conveniences and other advantages—we cannot revert to the *præ nisi-prius* days.

Again it was said that a day might be fixed for the trial of the action. But why? The answer was, because it is an important one. True; but every action is—to the parties concerned; the action of the poor widow for the loss of her one lamb, sheep, or cow is a more important one—to her. So that unless a day is to be fixed for the trial of every case (which is an impossibility) no day can, generally speaking, be fixed for the trial of any, without partiality. But if a day can be fixed for

the trial in Toronto why can it not be fixed in Kingston? No reason can be given unless favour be shewn to one county town not shewn to another.

And lastly, it was said that the trial would be delayed if had in Kingston. That however is not so; the assizes are to be held there before the case could be tried at any sittings—without the consent of the parties and leave of the Court—in Toronto. The assizes at Kingston are for the trial of non-jury as well as jury cases; the list—as I have said—is usually a short one; and, under any circumstances, the case seems such an one that the witnesses need not be called for until the evening of the day before they shall be required, and need not be detained longer than that day, if anything like as much solicitude for their convenience is practised as has been feelingly asserted on this interlocutory motion, of no sort of transcendent importance. No other point was urged in support of the motion. The case is admittedly not one within Rule 529 (b), and the practice has not been altered by that rule except in cases coming within its terms; if it were meant to be, the obvious course would have been to extend its terms. We are not to take an ell because we are allowed an inch. Whatever may have been done or said, or shall be done or said, in this or in any other case, my face is unchangeably set against everything having the appearance of favouritism: see *Halliday v. Armstrong* (1904), 3 O.W.R. 410, and in the Court of Appeal but not reported there.

The appeal is allowed; the order will be discharged; costs in the action.

The appeal was argued on March 7th, 1905, before FALCONBRIDGE, C.J.K.B., and GARROW, J.A., and STREET, J.

A. J. Russell Snow, for the defendant John T. Moore, referred to Con. Rule 529 (b),* and cited *Edsall v. Wray* (1900), 19 P.R. 245.

* 529 (1)—Subject to any special provisions the place of trial of an action shall be regulated as follows:—

(a)

(b) Where the cause of action arose and the parties reside in the same county, the place so to be named shall be the county town of that county. . .

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J. W. St. John, for the defendants, the Leadleys.*J. J. Maclellan*, for the plaintiffs, referred to *Halliday v. Armstrong* (1904), 3 O.W.R. 410.

March 17. The judgment of the Court was delivered by STREET, J.:—The writ of summons was issued on June 8th, 1903, by the Saskatchewan Land and Homestead Co., Limited, against two persons named Leadley. At that time the head office of the plaintiffs was at Toronto, the defendants, the Leadleys, lived there, and the cause of action arose there. On July 30th, 1903, the plaintiffs obtained an order amending the writ by adding as defendants two persons named Moore living out of the jurisdiction, in the North West of Canada. The statement of claim was filed on Sept. 30th, 1903, the venue being laid in Kingston. On December 11th, 1903, a meeting of the shareholders of the plaintiffs' company was held at Toronto and a by-law was passed changing the head office to the city of Kingston. The validity of this meeting and by-law are in question in this action. On January 13th, 1905, the statement of claim was amended materially and new allegations added. On February 13th, 1905, an order was made by the Master in Chambers changing the place of trial from Kingston to Toronto upon the ground of the great preponderance of convenience, and upon the authority of *McDonald v. Park* (1903), 2 O.W.R. 972. The plaintiffs appealed to Meredith, J., in Chambers, and on February 17th, 1905, he reversed the Master's order with costs and restored the venue to Kingston, but without giving written reasons for his decision. The present appeal is from that order.

Upon the argument I was strongly impressed with the fact that the undoubted balance of convenience was greatly in favour of a trial at Toronto. Had this been the only argument, however, in favour of a reversal of the decision of my brother Meredith and a restoration of the order of the Master, I should have felt much hesitation in giving effect to it in the present state of the authorities.

Under Rule 529, sub-sec. (b), however, it is provided that when the cause of action arose and the parties reside in the same county the place to be named as the place of trial shall be

the county town of that county. This sub-sec. (b) creates an exception to the general rule laid down in sub-sec. (a), which gives the plaintiff the right to name the place of trial at his will and lays down the rule that a case ought to be tried, if possible, where it arose and where the parties to it live. I think that the equity of the rule should be held to govern a case in which the cause of action has arisen in a county in which all the parties to it who are within the jurisdiction reside, as is the case here. The rule is passed as laying down a general rule adapted to the convenience of litigants, which demands that they shall not be compelled to go away from their county to try local actions unless in exceptional cases. The object of the rule is best served by requiring the trial to be held, under ordinary circumstances, in the county in which the cause of action arose when the only parties to it, who are within the jurisdiction, live there, because, as to those who are not within the jurisdiction at all, the place of trial must be comparatively unimportant.

In my opinion, therefore, the plaintiffs should originally have named Toronto as the place of trial, and the order of the Master changing the place of trial from Kingston to Toronto, with much respect for my learned brother, should not have been interfered with. My views in this respect are very much strengthened by what I consider to be a great preponderance of convenience in favour of Toronto as the place of trial.

The appeal should, therefore, be allowed with costs here and below to the defendants in any event upon the final taxation.

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[DIVISIONAL COURT.]

D. C. IN RE INGLIS AND THE CORPORATION OF THE CITY OF TORONTO.

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March 20.

Municipal Corporation—Bonus to Manufacturing Industry—Motion to Quash—Private Interest—Narrowing Street on Registered Plan—3 Edw. VII. ch. 19, sec. 591, sub-sec. 12, 632—4 Edw. VII. ch. 22, sec. 26.

A municipal by-law provided for closing part of a public street and conveying the same to a manufacturing company by way of bonus for the promotion of their business and of an intended enlargement of their works. No contract by the company to add to their works or increase their business, or employ additional men, had been entered into:—

Held, that this fact did not invalidate the by-law or prove that it was passed solely in the private interest of the company and not also in the public interest.

The fact that a municipal council in serving the interest of the public are at the same time serving that of the grantee of the bonus, is not an objection to such by-law.

Held, also, that the fact that the applicant to quash had bought his land under a registered plan which shewed the street to have a width of eighty feet, did not prevent the municipality passing a by-law, although by it the width of the street was reduced at the part affected to sixty-six feet.

APPEAL by the applicants, the John Inglis Company, Limited, from an order of Meredith, J., sitting in Court on February 13th, 1905, dismissing their motion to quash by-law No. 4462 of the corporation of the city of Toronto, entitled "a by-law to provide for the closing of part of Strachan avenue and conveying the same to the Massey-Harris Company, Limited."

The appeal was argued before FALCONBRIDGE, C.J.K.B., and STREET and ANGLIN, JJ., sitting as a Divisional Court on March 10th, 1905.

H. S. Osler, K.C., and *B. Osler*, for the appellants.

G. H. Watson, K.C., and *F. R. MacKelcan*, for the respondents.

The following were referred to: *In re Morton and the Corporation of the City of St. Thomas* (1881), 6 A.R. 323; *Pells v. Boswell* (1885), 8 O.R. 680; *Re Waterous and City of Brantford* (1904), 4 O.W.R. 355; *In re Peck v. Corporation of the Town of Galt* (1881), 46 U.C.R. 211.

March 20. STREET, J.:—By-law No. 4462, which is attacked by the present motion, recites that the Massey-Harris Company,

Limited, have applied to have the portion of Strachan avenue described in the by-law closed and conveyed to them, and that the committee on works have reported in favour of the application and that their report has been adopted by the council: and proceeds to enact that the easterly 14 feet of Strachan avenue lying between King street and Wellington avenue shall be stopped up and closed and that it be conveyed to the Massey-Harris Company, Limited.

The evidence filed upon the application, and in reply to it, shews that the portion of the street to be closed is to be conveyed to the Massey-Harris Company, by way of bonus for the promotion of the manufacturing industry carried on by them in Toronto, and to promote an intended enlargement of their works in Toronto. No contract by the company to add to their works or to increase the manufacture of their implements or to employ any additional number of men appears to have been entered into: and it is strenuously urged by the appellants that this circumstance is fatal to the by-law.

The sections of the Municipal Act, 3 Edw. VII., ch. 19, bearing upon the question are the general clause sec. 632 for closing and altering highways; secs. 591, sub-sec. 12 for granting aid by way of bonus; 591a, as amended by 4 Edw. VII., ch. 22, sec. 26, defining what is meant by a bonus and declaring that it may be given by closing up any portion of a street and conveying it for the use of a manufacturing industry.

Strachan avenue before the passing of the by-law in question was 80 feet wide between King street and Wellington avenue, so that the effect of the by-law will be to leave it still 66 feet in width.

The objections of the appellants are—

1st. That the by-law is not passed in the public interest but in the private interest of the Massey-Harris Co.

2nd. That the appellants, having bought a parcel of land upon Strachan avenue about 600 feet to the south of the part in question upon a plan shewing the street to be 80 feet in width between King street and Wellington avenue, are entitled to have it maintained at that width, and that their property will be deteriorated in value by the narrowing of it.

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In support of the first of these objections, namely, that the by-law was passed not in the public interest but to serve the private interest of the Massey-Harris Company, we were referred to a case of *Re Waterous and City of Brantford*, reported in 2 O.W.R. 897, and 4 O.W.R. 355, in which my brother MacMahon made an order quashing a by-law under facts which, at first sight, bear a strong resemblance to those found in the present case, and his decision was confirmed by the Court of Appeal.

An examination of that case, however, shews that the by-law in question was not passed by way of granting a bonus to the Waterous Engine Works, but solely as a matter governed by the general section 632 of the Act. It has been repeatedly held by our Courts that the powers granted by that section must be exercised for the public interest and not for the private interest of any corporation or individual. In *Re Waterous and City of Brantford* the corporation acting under sec. 632 closed a street called Jex street, at the request of the Waterous Engine Works Company, who wished to use it, and who agreed to convey to the corporation in its place a parcel of land to be used as a highway in lieu of that closed up. It was the simple case of a highway being closed for the benefit of a private corporation and the substitution of a new highway in its place more convenient to the private corporation, but less so to the public. The case was thus brought within the principle of *In re Morton and the City of St. Thomas*, 6 A.R. 323. I think it is plain that that decision is not an authority which at all governs the present case. Where a municipal corporation grants a bonus of any kind to a manufacturing company it is quite true that the council must act in doing so in the public interest which they represent, but at the same time the private interest of the recipient of the bonus is necessarily present and is a feature which cannot be excluded. The council is bound not to grant a bonus unless they consider that the interest of the public requires them to do so, but the fact that in serving the interest of the public they are at the same time serving the interest of the grantee of the bonus, is not an objection to the by-law. The Court found in *Re Waterous and City of Brantford* that the interests of the public would not be furthered by the closing of the street and the substitution of a

longer and less convenient one : and that no one would be benefited but the applicants. If we could find here that the council were wrong in the conclusion to which we must assume they came, viz., that the public interest would be served by closing this 14 feet and conveying it to the Massey-Harris Company, then the by-law should not stand. But it appears that the council did not take action in passing the by-law without much consideration : two-thirds of the landowners upon the street supported the application, and it was further supported by a petition signed by some 1,100 residents of Toronto, all or most of whom are workmen at the works of the Massey-Harris Company.

If the council had acted hastily and without taking any measures to determine whether the public interest would be served by passing the by-law, and there were a strong preponderance of evidence the other way, it might have been possible for us to say that it should not stand. The municipal council is the body to whose discretion has been committed the duty of deciding whether the granting of a bonus is or is not in the public interest : and if a *bona fide* decision is arrived at by them it should not, in my opinion, be disturbed by the Courts except under very special circumstances. It is urged that the omission of any obligation on the part of the Massey-Harris Company to increase their works or employ additional men or to give any other consideration for the grant of the piece of street, stamps the transaction as one which is in their interest and not in that of the public. I do not so read the sections in question, for the council may under sub-sec. (a) of sec. 591a, grant money by way of gift unconditionally by way of bonus : if they can grant money unconditionally for the promotion of manufactures, the absence of a condition in a grant of land can hardly be treated as a fatal objection. The evidence upon the present application shews distinctly that the land granted was intended to be immediately used by them in connection with additional works. The respondents have therefore, in my opinion, failed to make out that the by-law was not passed in the public interest.

The other ground is, that the council had no right as against a purchaser, under the registered plan which shewed this street to have a width of 80 feet, to pass a by-law reducing its width to 66 feet.

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This proposition, if sound, would prevent a municipal council from closing or altering any street upon which lots had been sold except with the assent of the owners, and it cannot, in my opinion, be supported.

The decision in *In re Peck v. Corporation of the Town of Galt*, 46 U.C.R. 211, was based upon the acceptance by the municipal corporation of a dedication of land by an individual as a public square which it was held made them trustees to preserve it for that purpose, and a by-law for closing and selling it was quashed upon the ground that it was a breach of their trust. That decision, in my opinion, has no application here.

In my opinion the appeal should be dismissed with costs.

FALCONBRIDGE, C.J., concurred.

ANGLIN, J.:—The applicants appeal from an order of Meredith, J., dismissing their motion to quash by-law 4462 of the city of Toronto.

Strachan avenue, in this city, lies between the present factories of the respondent company and other property on which they held options of purchase when the by-law in question was first proposed and which they had actually purchased before its adoption. This street has a width of 80 feet, of which the by-law closes the easterly 14 feet between King street and Wellington street and provides for its transfer to the respondent company.

The applicants allege that this by-law is illegal and invalid because passed, as they maintain, not in the interest of the citizens at large—but exclusively in that of the respondent company.

By sec. 591, sub-sec. 12, of the Consolidated Municipal Act of 1903, 3 Edw. VII., ch. 19, municipalities are empowered to pass by-laws “for granting aid by way of bonus for the promotion of manufactures within the limits of the municipality . . . subject to such terms, conditions and restrictions as the said municipality may deem expedient.”

By clause (c) of sub-sec. 12 of sec. 591, it is provided that “any municipality granting such bonus may take and receive security for compliance with the terms and conditions upon which aid is given.”

The word "bonus" as defined by sec. 591 (a) includes "(c) The gifts of lands owned by the municipality . . . as a site for building and works . . . " and "(d), The closing up . . . of any street . . . for the particular use or benefit of a manufacturing industry."

The assent of the electors to such a by-law required by clause (a) of sub-sec. 12 of sec. 591, is dispensed with by sec. 26 of 4 Edw. VII., ch. 22, which adds the following as an amendment to sec. 591 (a) above in part quoted:—

"Notwithstanding anything contained in this section, or in section 591 of this Act, the council of any municipality may pass by-laws for the closing up any road, street, . . . or any portion thereof and for conveying the same to any person for the particular use or benefit of a manufacturing industry."

The by-law in question imposes no terms or conditions upon the donees of this "bonus." It makes of the strip of land dealt with an absolute and unconditional gift to the respondent company. Mr. Osler argues that though the statute places no restriction upon the nature or the value to the municipality of the terms or conditions which the council may impose, it requires that there should be some terms or conditions annexed to any grant of aid by way of bonus; that clause (c) providing for security emphasizes this requirement; and that the absence of all terms and conditions is inconsistent with the by-law having been passed in the public interest.

There is much ingenuity in this argument. But the legislature has expressly sanctioned the "bonus" system. Benefit to the proprietors of the manufacturing industry interested is necessarily involved in that system. Where lands owned by a municipality form the bonus, the legislature authorizes a "gift" of them or "the leasing of (such) lands either freely or at a nominal rental." These provisions of the Act of 1903 seem inconsistent with any obligation to annex terms or conditions to the "gift." The Act of 1904 in express language confers power to pass precisely such a by-law as that under consideration, and neither terms nor conditions are mentioned in it. It further imposes the obligation to compensate persons injured upon "the owner of the manufacturing industry for whose use or benefit the by-law was passed:" 4 Edw. VII. ch. 22, sec. 26.

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Again, if Mr. Osler's contention as to the necessity of some terms or conditions being annexed to the granting of aid were to prevail, its discretion as to the character of such terms and conditions being absolute and unfettered, the council might well impose terms so nominal or conditions so illusory that it would be farcical to regard them as a burden to the donee or an advantage to the municipality. The Court cannot be asked to assume the duty of determining when or to what extent terms or conditions annexed by the municipality to a grant of aid are a substantial benefit to the citizens at large. When it is in the public interest to pass a "bonus" by-law "for the benefit of the owner of a manufacturing industry," and whether any, and if any, what terms and conditions should be imposed upon such an owner so aided, the legislature has authorized the municipal council to determine. Without to some extent usurping the powers and functions so conferred, the Court cannot enter upon the inquiry which would be involved in an acceptance of the contention of the appellants. Nor does the absence of terms and conditions afford any evidence that a by-law, admittedly beneficial to a manufacturer, may not at the same time serve public interest. It may be for the best interests of the municipality that it should make the gift in the unconditional form, which the legislature sanctions. Whatever may be thought of the policy of this legislation, its purpose and intent seem clear—and with that only are we now concerned.

Neither can effect be given to the objection made to the by-law on the ground of alleged interference with rights of owners of property adjoining Strachan avenue and purchased according to a registered plan shewing that thoroughfare with a width of 80 feet throughout. The legislature has conferred upon the municipal council absolute and unrestricted powers. It cannot be assumed that any private right so obvious in character escaped its attention. Nor can we in order to safeguard such rights narrow and restrict, to the extent of virtually abrogating them, powers thus conferred in terms so wide and positive.

The appeal, in my opinion, fails and should be dismissed with costs.

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*Guarantee—Application—False Answers—Basis of Contract—Insurance Act—
R.S.O. 1897, c. 203, s. 144 (1) (2).*

The plaintiff company's manager applied for and obtained from the defendants an agreement guaranteeing his fidelity, and accompanied his application with a declaration of its president, containing answers to questions touching his duties, which answers it was agreed were to be taken as the basis of the contract. The contract recited on its face as follows: "Whereas the employee has delivered to the company certain statements and a declaration setting forth among other things the duties and remuneration of the employee, and the checks to be kept upon his accounts, and has consented that such declaration and each and every the statements therein referred to or contained shall form the basis of the contract, but this stipulation is hereby limited to such of the said statements as are material to this contract:"—

Held, that this had the effect of embodying the material facts of the preliminary application and declaration whether by the employee or employer into the face of the contract, and satisfied the requirements of sec. 144 (1) of the Insurance Act, R.S.O. 1897, c. 203, that "the terms and conditions of the contract shall be set in full on the face or back of . . . the contract."

Held, however, *per* BOYD, C., and MAGEE, J., MEREDITH, J., *contra*, that the case fell rather under s. 144 (2) which provides that any term or condition avoiding the contract on account of false preliminary statements, must be limited to cases in which such statements are material to the contract,—but does not require that such term or condition shall be contained in or endorsed upon the contract "in full." It is enough if the contract "be made subject" to such stipulation.

Judgment of MACMAHON, J., 8 O.L.R. 117, reversed on this point.

Held, also, that the statements made by the plaintiffs' president when seeking the insurance, that "all withdrawals from the savings bank require the joint cheque of the president and manager," and that "a thorough and systematic audit is made by the company's auditors," whereas in fact the cheques were signed in blank by the president in batches, and so given to the manager, and no attempt was made to verify the savings bank accounts, were unquestionably material and affected the risk.

THIS was an appeal by the plaintiffs from the judgment of MacMahon, J., reported 8 O.L.R. 117.

The appeal was argued on Dec. 12th and 13th, 1904, before BOYD, C., and MEREDITH and MAGEE, JJ.

The facts of the case are sufficiently stated in the judgments.

W. K. Cameron, for the plaintiffs, contended that the liability of the defendants had accrued before the change made

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in the nature of the plaintiffs' business upon which the judgment below proceeded, and that the right of action which had accrued could not be divested by what happened afterwards.

J. B. Clarke, K.C., for the defendants, contended that the change in the way of doing business had avoided the contract of guarantee; and that the defendants moreover had been misled from the outset by the plaintiffs' misrepresentation that there was a real and thorough way of conducting the company's audit, and as to the mode of signing cheques; and that the contract contained a condition warranting the truth of these statements: *In re London and General Bank*, [1895] 2 Ch. 673, 682; *The North Western R.W. Co. v. Whinray* (1854), 10 Ex. 77; *Haworth & Co. v. Sickness & Accident Assurance Association* (1891), 28 Sc.L.R. 394; *Dougharty v. London Guarantee and Accident Co.* (1880), 6 V.L.R. 376; *Dicksee on Auditing*, 2nd ed., p. 132 *et seq.*; R.S.O. 1897, ch. 203, sec. 144.

Cameron, in reply, contended that such representations were not binding on the plaintiffs unless made under their corporate seal: *Holt's Case* (1856), 22 Beav. 48; *Nicol's Case* (1858), 3 DeG. & J. 387; *Re Hull & London Life Ass. Co., Gibson's Case* (1858), 2 DeG. & J. 275; *Burnes v. Pennell* (1849), 2 H.L.C. 497; *County of Simcoe v. Burton* (1898), 25 A.R. 478; that it was no part of the president's duty to make such representations: *Benham v. United Guarantee and Life Ass. Co.* (1852), 7 Exch. 744; that it is only the answers of the "assured," *i.e.*, the person whose fidelity is guaranteed that can be read into the contract: R.S.O. 1897, ch. 203, secs. 144, 2 (45); that the Legislature intended that every warranty should be set out in full or endorsed on the policy; that in fact there was a thorough and systematic audit made: R.S.O. 1897, ch. 205, sec. 92; *In re London & General Bank*, [1895] 2 Ch. 673; and that neglect of duty on the part of auditors will not free the surety: *County of Frontenac v. Breden* (1870), 17 Gr. 645; *County of Simcoe v. Burton*, 25 A.R. 478; *Exchange Bank of Canada v. Springer* (1884-7), 7 O.R. 309, 13 A.R. 390, 14 S.C.R. 716. He also referred to *Calvin v. Provincial Ins. Co.* (1870), 20 C.P. 267; *Lindley on Companies*, 6th ed., pp. 269, 271.

February 24th. BOYD, C.:—I see no reason to disagree with the conclusions on fact of the learned trial Judge: he finds that the statements of the employers in answer to the questions were untrue, and that they were material to the contract. But on the question of law he finds that these terms and conditions not being set out in full on the face or back of the sealed and written instrument which embodies the contract of guarantee—there has been a failure to comply with the statutory provisions, and that these terms and conditions thereby became inadmissible in evidence and consequently inoperative.

With this conclusion I am not able to agree. The statute in question is R.S.O. 1897, ch. 203, sec. 144: and the important parts are sub-sec. (1) and (2). The origin of these provisions may be traced back to the enactments of the Dominion of Canada in 1885, found in 48-49 Vict. ch. 49, secs. 7 and 8, and are now in the Dominion Revised Statutes, ch. 124, secs. 27 and 28.

The guarantee agreement in this case issued upon and after the proposal or application of the employee fortified and accompanied by the answers of the company (the employers) touching the duties of the applicant, which answers it is agreed are to be taken as the basis of the contract between the employers (the plaintiffs) and the defendants (the guarantee company). Upon these papers, statements, and representations, the contract was issued and accepted by the plaintiffs. On the face of the sealed contract of insurance or guarantee it is thus recited, "Whereas the employer has delivered to the company certain statements and a declaration setting forth among other things the duties and remuneration of the employee, the moneys to be entrusted to him and the checks to be kept upon his accounts, and has consented that such declaration and each and every the statements therein referred to or contained shall form the basis of the contract hereinafter expressed to be made, but this stipulation is hereby limited to such of said statements as are material to this contract."

This last clause is apparently the outcome of what was deemed a proper form of expression to comply with sub-sec. 2 of sec. 144 of R.S.O. 1897, ch. 203: see *Village of London West v. London Guarantee and Accident Co.*, (1895) 26 O.R. 520, 525, in which the defendant was this company now defendant.

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The effect of this method of drafting is to embody or incorporate the material, *i.e.*, what shall be found to be the material parts of the preliminary application and declaration whether by the employee or the employers into the face of the contract. The cases which are binding upon us shew that it is not needful to set out verbatim what is referred to in order to satisfy the statutory expression "in full." It is enough to unite by express reference as is here done the basis of the contract and the actual contract resting thereon. That was held on the Dominion statute by the Supreme Court in *Venner v. Sun Life Insurance Co.* (1889), 17 S.C.R. 394, followed by the same Court in 1898, and held applicable to the construction of the Ontario Statute of 1892, 59 Vict. c. 39, which is in terms the same as the section now under consideration: *Jordan v. Provincial Provident Co.*, 28 S.C.R. 554.

I am disposed to think, however, that the proper sub-section which applies to this controversy is sub-section (2) rather than (1) of sec. 144 having regard to the difference in the legislative language. Sub-sec. (1) is addressed to such terms and conditions as modify or impair the contract; whereas (2) provides for statements in the application for inducing the entering into of the contract by the corporation, which being erroneous or false and material *avoid* the contract *ab initio*. The language of the statute was used originally in the Dominion Act as to contracts of life insurance and a plain distinction is marked in the books between conditions subsequent affecting the policy prejudicially, and those which operate to nullify the contract from the outset. The point I make has been judicially considered by Gwynne, J., in *Fitzrandolph v. Mutual Relief Society of Nova Scotia* (1890), 17 S.C.R. at p. 342, where in view of the like distinction of expression in the Dominion statute he says the former (as to modifying or impairing) has application only to conditions subsequent. . . and not to a warranty of the truth of matters upon the face of which the contract is based."

If sub-sec. (2) of sec. 144 is alone to be considered, it appears to me to contain *in gremio* sufficient to indicate that the terms which go to avoid the contract need not be contained in or endorsed upon the contract "in full." It is enough if the contract "be made subject" to any stipulation as to avoiding

the contract by reason of any statement inducing the entering into of the contract by the corporation. In this case the contract is made subject to the preliminary statements and declarations by the words of incorporation in the preamble already set forth in this opinion.

Besides this I think that there is an express notice given on the face of the agreement that "if any suppression or misstatement of any fact affecting the risk of the company be made at the time of the payment of the first or any subsequent premium . . . this agreement shall be void and of no effect from the beginning."

The original untrue statements were made contemporaneously with the first payment of premium and they were unquestionably material and affected the risk.

Taking this view I have not thought it necessary to deal with the legal effect of the subsequent change of work undertaken by the manager under directions given by the officers of the company which they were not authorized to give by the company, and which involved the doing of business which was beyond the corporate powers. No loss arose as a consequence of these *ultra vires* acts, and I am inclined to think that upon the application of the rule in *Exchange Bank of Canada v. Springer*, 14 S.C.R. 716, the guarantee might hold as to prior defalcations. But upon this I do not pass but place my judgment on the other ground in regard to which neither the learned Judge below nor this Divisional Court had cited the cases in the Supreme Court which appear to govern the construction of the statute: see *Hunter on Insurance*, p. 230. I would affirm the result below with costs of appeal.

MAGEE, J., concurred.

MEREDITH, J.:—That the learned trial Judge reached the right conclusion upon the more material facts I have no manner of doubt; it is difficult to perceive how any different conclusion could have been reached respecting the statements of the defendants' president, when seeking the insurance in question, that "all withdrawals from the bank require the joint cheque of the president and manager," and that "a thorough and systematic audit is made by the company's auditors." If the

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first of these statements had been a cunningly devised scheme to mislead it could hardly have been more effectually made. It was made in answer to a question designed to ascertain what means were adopted to prevent mistakes and wrongdoing in the receipt or payment out of the company's money by its manager, and the answer was directed to giving assurance of care in that respect. Now it is important to bear in mind, in the first place, that the manager had the whole and sole control of the company's business, that it had no other clerk or employee and that its business was that of keeping a savings bank open to the public as well as lending money upon real property; then what were the facts in regard to withdrawing money on cheques? It was literally true that the signature of both president and manager was required, but it was substantially false because the cheques were signed in blank by the president in batches and so given to the manager; so that in truth, so far as his power was concerned, the signature of the president was no safeguard, the manager might as well for most purposes have had power to withdraw money upon his own signature only to the company's cheques. If the answer were designedly made to mislead the defendants it was a fraud upon them, so that the plaintiffs gain nothing asserting its literal truth. And all this is accentuated by the president's answer to question 11. It too was pointed towards safeguards over the manager's power to withdraw the company's money from its bankers, and expressly mentions "some other officer having joint charge of the accounts;" not some other officer who might as well have been a rubber stamp for all the check he was in this respect over the manager.

That there was not a thorough audit seems to me undeniable. No attempt was made to verify the savings bank accounts; a thing easily accomplished, the bank having only a local and limited business. Having regard to the fact that there was no other officer or clerk as a check upon the manager, it seems to me like recklessness to have permitted this banking business to proceed year after year without any sort of an attempt to verify any one of the accounts. But it is said that the audits of other savings societies were conducted in the same way. It is, in the first place, no answer to a charge of negligence to shew that

others were equally negligent, and though it is true that other societies took no steps to verify their depositing customers' accounts, it is not true that they were similarly situated. All of them had different clerks for their several departments beside their manager, the one being a check over the other. If there had been even one clerk in this company's office, the defalcations of their manager could not have taken place unknown. But apart from all this, the president did not say, "our audit is the same as or similar to that of others." If he had that might have been a very unsatisfactory answer as many an unfortunate loan company's shareholder can testify to. This is not the only loan society which has been wrecked through an inefficient audit. That which he did say was that there was a thorough audit; and it seems very difficult to understand how he could have candidly given such an answer for he knew that the audit was neither efficient nor thorough. Not long afterwards that fact was pointedly brought to his attention by one of the company's auditors; it was pointed out to him that as the manager alone did all the work of the office there was no check of any kind over him, and in order that there might be it was necessary to verify the depositors' accounts by communication with them, a very ordinary and usual proceeding even where there are many clerks and so much less need for it; but that he would not permit to be done. It was not true that "a thorough and systematic audit is made by the company's auditors;" it was very far from being true, and the president ought to have known it. No one who knows anything of the duties of auditors would venture to say that their duties are confined to discovering clerical errors in the books. If that were all some school boy could as well perform their duties and save their cost. Nor is anything gained by saying it is easy after the event to point out how the wrong might have been prevented, that any one however stupid can do that. Auditors are not employed and paid for being no wiser or more careful than the stupid; they are employed and paid because they are supposed to have the skill and knowledge at least to see an open door for theft and to provide against its use; and in this case theft had been going on for years through a known open door without a step being taken or a hand moved to prevent or detect it.

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But put upon the lowest ground there were misstatements as to these facts which were material to the contract and which under its terms avoid it, unless the provisions of "The Ontario Insurance Act" prevent. The learned trial Judge was of opinion that they did, and, though there is much to be said in support of that opinion, I am in that unable to agree with him. The point is a simple one: the Act provides that no term impairing the effect of a contract of insurance shall be valid unless set out in full on the face or back of the policy, but that is not to exclude the application of the assured from being considered with the policy in respect of material misrepresentations contained in it; and the question is whether the proposal or application of the assured was or included the president's answers in which the misrepresentations were made. The "form of proposal" was intended to be, and was, filled in and signed by the manager, the person whose fidelity was to be insured by the company to the society, but the answers of the president accompanied it and were an essential part of the application; it is not therefore too much to say that the answers in question formed part of the application for insurance. They are of even date with the manager's answers, and otherwise bear intrinsic evidence of being part of the application. The contract was to be not with the manager but with the company; they alone were to have any rights under it and benefits to be derived from it; he was to be in no way a party to it. The learned Judge has expressed no opinion in conflict with this, but came to the conclusion that the words "the assured" meant the manager and therefore the writing signed by him in making the application could alone be looked at, relying upon the interpretation clause of the Act which provides among other things (sec. 2, subsec. 45) that the words "the assured" shall mean "the person whose . . . fidelity . . . is insured." But there seem to me to be two sufficient answers to that argument, first, that the assured's proposal or application was not confined to the writing signed by him but included the other writing signed by the president, which accompanied it, and, second, the interpretation clause in the same sub-section also provides that the words "the assured" shall mean the person whose "insurable interest is insured," and that was the society; and in addition to

these reasons it may be pointed out that the interpretation clause does not apply if "a contrary intention appears," and that it would be extraordinary if the Act perverted the meaning of the word "assured," and excluded the statements of the real assured, and admitted those of the person whose fidelity merely was the subject of the insurance. No part of the application signed by the manager was made the basis of or incorporated into the contract. It has reference to matters affecting him personally, whilst that part signed by the president relates largely to the company to be assured, and is largely made expressly the basis of the contract and incorporated with it.

Little assistance is gained from the cases cited in which the representations were not made part of the contract, and less from those which were also only prospective, expressed in the future, not in the past or present tense.

The contention that the president had no authority to make any representations for the company is probably unfounded in fact; but whether so or not the contract is expressly based upon his representations on behalf of the society, and the plaintiffs are suing upon that contract; they cannot dismember it; they cannot eliminate that which they do not like and enforce that which pleases them only. They must stand or fall upon it as it is, or repudiate it altogether.

For these reasons I would sustain the judgment dismissing the action, and dismiss this motion; and it is unnecessary to consider any of the other questions raised in the action and which were fully discussed upon the motion.

But it is right to add that I cannot agree in the opinion that sec. 144 (1) of R.S.O. 1897, ch. 203, does not apply to this case. The parties, and the Court, have hitherto dealt with it as if it did, without a suggestion from anyone that it does not, and in my opinion rightly so. Is not the term or condition of the policy in question one "impairing" the contract of insurance? And, if that part of the section be inapplicable to terms or conditions based upon the application, what is the sense of the clause (a) which has been added to it? It has in practice, so far as I know, always been treated as if so applicable. Sub-s. (2) was, in the original enactment, necessary to limit terms or

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conditions impairing the contract, by reason of anything contained in the application, to cases in which the thing impairing the contract was material; in other words to plainly prevent the contract being avoided by breach of "warranty" not material, as otherwise it would be.

The point, however, is immaterial in this case, for sec. 144 (1) being applicable, these defences are admittedly as fully open to the defendants, under clause (a), as if sec. 144 (1) were wholly inapplicable.

A. H. F. L.



[IN CHAMBERS.]

RE THE NORTH AMERICAN LIFE ASSURANCE COMPANY

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Feb. 22.

Division Courts—Judgment Inadvertently Entered for Wrong Person—Correction of—Prohibition.

In a Division Court action for \$70 the Judge, by a mere slip, so obvious that no one was misled by it, directed judgment to be entered for the defendant instead of the plaintiffs, and about three weeks afterwards, on his attention being called to it, the mistake was corrected in the presence of the solicitors who appeared for both parties at the trial. Immediately after the trial the defendant had an interview with his then solicitors, when he was advised that there would be no use in moving for a new trial. He then retained a new solicitor, and without, in any way, communicating with his former solicitors, or making any application for a new trial, and, after the time therefore had elapsed, moved for prohibition:—

Held, that the application would not lie.

THIS was a motion by the defendant for prohibition to the First division court in the county of Kent.

The motion was argued before MEREDITH, J., in Chambers, on February 22nd, 1905.

W. H. Blake, K.C., for the motion.

C. A. Moss, contra.

February 22. MEREDITH, J.:—The defendant was sued upon his promissory note for \$70. The claim was one in all respects within the jurisdiction of the Court; and there is nothing on the face of the proceedings indicating any want or excess of jurisdiction whatsoever, nor indeed any irregularity; so that in any case the granting or refusing of prohibition would rest in the discretion of this Court.

Upon affidavit it is made to appear that, through some misunderstanding between the defendant and his solicitors, or through some mistake of one or other of them, the trial of the case took place in the defendant's absence, but at a regular sitting of the Court, to which the trial had been regularly postponed, and one of the sittings mentioned in the summons served upon the defendant, and at which his solicitors appeared

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for him and defended the case as well as they could in the absence of him and his witnesses, and judgment was thereupon given for the plaintiffs with costs. The solicitor seems to have had no hope of succeeding, in view of the documentary evidence the plaintiff possessed, and that fact may have affected to some extent their conduct of the defence throughout. By a mere slip, the Judge, in making his minute of the judgment, wrote "judgment for defendant," instead of "judgment for plaintiffs." The mistake was so obvious, that no one at the trial could pretend to be misled by it. That slip, and the correction which was subsequently made of it, are all upon which this application is based; matters of practice, not matters of jurisdiction. Some time afterwards—about three weeks—the Judge's attention was called to the mistake, in the presence of the solicitors who had appeared for the parties at the trial, and it was corrected by him, the solicitors consenting. Immediately after the trial, the defendant was notified by his solicitors by letter of the result, and about a week after that he called at their office and the matter was discussed, and he was told that there was not much use in applying for a new trial. A few days afterwards he sought advice of and retained a new solicitor, whom he informed of the fact that judgment had gone against him in his absence; and thereupon they went together and saw the mistaken entry of judgment for the defendant, and, apparently without any communication with the former solicitors, or any effort whatever to ascertain how the mistake—whether in the writing or in the information the defendant had had in writing and verbally from his solicitors—had occurred, abstained from making an application for a new trial or for any other relief, though the defendant's whole purpose in seeking a new solicitor was to have the case re-opened, so that his defence might be heard.

It is hardly imaginable that the defendant and his new solicitor could really have believed that the entry was in accordance with the fact. The very least inquiry would have made plain the clerical error. Inquiry of every sort seems to have been avoided. It is difficult to look upon the evidence of the defendant and his solicitor, after their discovery, as anything but disingenuous. Almost immediately after the correc-

tion of the error by the Judge, the new solicitor was informed of it, and he at once by letter informed the defendant. The retainer of the first solicitors was not withdrawn, nor had they any knowledge of a new solicitor having been retained by the defendant until some days after the correction of the error. The plaintiffs, before the discovery of the error, were willing to consent to the defendant having a new trial, as judgment had been obtained in his absence, and they are yet willing that there should be a new trial; but the defendant is not willing to take a new trial, nor, I am quite satisfied, ever has been since the discovery of the mistake in the minute of the judgment being buoyed up in the vain hope of defeating the plaintiffs' claim altogether by reason of it.

I have no manner of doubt of the Judge's power, nor indeed of his duty, to correct the mere slip which he had made, and he having done so, it was the clerk's duty, under rules, to make the like corrections in the proceedings in his office. Altogether, apart from any rules upon the subject, that must be an inherent power of every Court such as that or this. It was done in the presence, and with the consent, of the solicitors on both sides who had appeared at the trial, and without any notice or knowledge of any change or desired change of solicitor.

It was open to the defendant to move to set aside the amendment, and, if he had done so, that would have resulted doubtless in a new trial; at all events, it was the subject of a motion before the Judge who made the amendment, not of a motion for prohibition. Dealt with strictly, the judgment pronounced at the trial was regular and binding.

All that the applicant complains of, all that he can feel aggrieved about, is that he has not had the opportunity he now thinks he should have had, of applying for a new trial; that, as I have said, is his own and his new solicitor's fault more than the fault of any one else; and, besides that, a new trial is now offered to him; and, at the first, a new trial was offered his solicitors, but with great inconsistency the offer was rejected.

The motion must be dismissed, and dismissed with costs payable forthwith after taxation, if plaintiffs remain willing to have a new trial; otherwise without costs.

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[IN THE COURT OF APPEAL.]

C. A. FLYNN V. TORONTO INDUSTRIAL EXHIBITION ASSOCIATION.

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April 4.

Negligence—Dangerous Premises—Invitation—Landlord and Tenant.

The defendants were the lessees of large grounds, which they used for the purpose of holding an annual exhibition of arts and manufactures, etc., and as an additional means of attracting the public various amusements were provided. Among these was a merry-go-round in a small fenced-in enclosure within the grounds, the owner of this merry-go-round having entered into a special agreement with the defendants as to the place and mode of using it, and for the payment to them of a certain sum out of the moneys received by him for its use. For entrance to the grounds a fee was charged by the defendants, and for entrance to the small enclosure and use of the merry-go-round a further fee was charged by its owner. The plaintiff having paid these fees, got on the merry-go-round, and was severely injured on its breaking because of a defect in its construction:—

Held, that the agreement in question was a license, not a lease; that the defendants had a right of supervision which they should have exercised; that they had impliedly invited the public to use the merry-go-round; and that they were liable in damages because of its negligent construction. Judgment of Meredith, C.J., affirmed.

APPEAL by the defendants from the judgment at the trial.

The following statement of the facts is taken from the judgment of GARROW, J.A.:—

The action was brought by the infant plaintiff and her father to recover damages resulting from an injury to the infant plaintiff under the circumstances following:

The defendants are the lessees of a large enclosed park in the city of Toronto which they use for the purpose of holding an annual exhibition in arts, manufactures, agriculture, etc. Admission is obtained through a gate or gates upon payment of a fee. The exhibition is widely advertised and attracts large numbers of people during the two weeks of its course. And in addition to the exhibition itself the defendants allow within the park various places of amusement as attractions for the purpose of increasing the popularity of the exhibition itself.

The infant plaintiff, aged fourteen years, visited the exhibition grounds in September, 1903, paid the usual fee at the gate and was admitted to the park. In the park, but in a small enclosure with a gate, stood a machine called a "razzle dazzle," a species of merry-go-round. This had been erected, and was owned, by Sprague & Co., travelling showmen, under an agreement with the defendants, for the privilege of erecting and

maintaining which they had paid to the defendants \$100. At the gate which admitted to the razzle dazzle a further fee of five cents was collected by Sprague & Co. for their own use.

The agreement between Sprague & Co. and the defendants provides that the defendants "agree to provide the contractor (Sprague & Co.) with ground space not exceeding 50 feet on the grounds during the term of the Toronto Exhibition for 1903 for the purpose of enabling the contractor to give performances or exhibitions of his said show, and charging an admission fee to the public therefor, the association (defendants) to be entitled to \$100 of the gross receipts therefrom, to be paid in cash.

The contractor agrees to be governed by the general rules and regulations of the said association, and that the general management and conduct of the show shall be subject to the supervision and approval of the manager of the association, who shall also have the right to require the removal of any objectional features in connection therewith, and to cancel this contract and order the closing up of the said show for violation of the terms of this contract, or for any neglect, misrepresentation, vulgarity, or infringement of rules, without him or the association being liable for any claims or expenses incurred on the part of the contractor.

The contractor shall indemnify the association from and against all claims and demands, costs, charges, and expenses, which the association may incur or be put to by reason of any accident to any person caused by the negligence of the contractor or in the giving of his said show, and the association shall not be responsible to the contractor for any damages or loss occasioned by fire or any other cause.

It is distinctly understood that no vulgarity, immoral displays, or objectionable features of any kind, will be tolerated, and the manager of the association shall be the sole judge or authority in the foregoing or any other matter whatsoever."

The infant plaintiff paid the five cents demanded for a ride in the razzle dazzle and was seated upon it with some forty-five others when it suddenly collapsed and she was very severely injured.

The collapse, it is scarcely disputed, occurred owing to the faulty material of the centre post, which was of wood, upon

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which the whole weight rested, and the lack of sufficient guys or stays, defects which, as the evidence shews, would have been easily ascertained by anything approaching competent inspection, of which there was absolutely none by the defendants.

The action was tried at Toronto before Meredith, C.J.C.P., who gave judgment in the plaintiff's favour.

The appeal was argued before MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A., on the 23rd of January, 1905.

Shepley, K.C., and *R. H. Greer*, for the appellants. The owners of the machine in question, and not the appellants, are the only persons, if any, liable in damages. They were independent contractors or tenants and in either view had exclusive control, and the appellants are not responsible for anything done or omitted by them: *Daniel v. Metropolitan R.W. Co.* (1871), L.R. 5 H.L. 45; *Nelson v. Liverpool Brewery Co.* (1877), 2 C.P.D. 311; *Hadley v. Taylor* (1865), L.R. 1 C.P. 53; *Miller v. Hancock*, [1893] 2 Q.B. 77; *Lane v. Cox*, [1897] 1 Q.B. 415; *Black v. Woolf*, [1898] 2 Q.B. 426; *Saunders v. Toronto* (1899), 26 A.R. 265; *Schmidt v. Berlin* (1894), 26 O.R. 54. It is true that the machine in question was one of the attractions of the fair, but the appellants did not hold themselves out as insurers of the safety of persons using it, or become liable because of the carelessness of the proprietor: *Knottnerus v. North Park Street R.W. Co.* (1892), 93 Mich. 348. There was nothing dangerous in the machine in itself and no injury could have resulted except to those who deliberately and voluntarily went upon it.

W. N. Ferguson, for the respondent. The defendants had full control of the erection and operation of the machine and shared in the profits derived from its use, and there was not an independent contract or lease, but merely the appointment of a servant or licensee, the legal responsibility resting upon the defendants: *Marshall v. Toronto Industrial Exhibition Association* (1901), 1 O.L.R. 319, 2 O.L.R. 62; *Oxford v. Leathe* (1896), 165 Mass. 254; *Kirk v. Toronto* (1904), 8 O.L.R. 730.

At the least Sprague & Co. were joint contractors. This machine was one of the general attractions, and the defendants were bound to see that the persons invited by them to use it could do so in safety, and, having neglected that duty, they are liable: *Francis v. Cockrell* (1870), L.R. 5 Q.B. 184, 501; *Holliday v. National Telephone Co.*, [1899], 2 Q.B. 392; *Sington on Negligence*, p. 48; *Richmond and Manchester R.W. Co. v. Moore* (1897), 94 Va. 493; *Selinas v. Vermont State Agricultural Society* (1887), 60 Vt. 249.

Shepley, in reply.

April 4. OSLER, J.A.:—The agreement between Sprague and the defendants was in my opinion a license only and cannot be regarded as a lease of the ground space in which his show was to be given. His right of occupation was solely "for the purpose of enabling him to give performances or exhibitions of his said show," a right, in short, to use the defendants' property in a certain way and on certain terms, while it remained in other respects in the possession and under the control of the owner: *Taylor v. Caldwell* (1863), 3 B. & S. 826, at p. 832; *Regina v. Morrish* (1863), 32 L.J.M.C. 245. Within the space allotted he might give his show, but except while actually engaged in doing so there was nothing to prevent the defendants by their officers or servants from entering upon or going over the ground so appropriated. The tenor of the agreement in other respects, to be presently mentioned, shews the non-exclusive character of the showman's occupation. That the agreement was a license and not a lease does not, however, conclusively establish the defendants' liability for an accident resulting from the faulty construction or the negligent use of the machine placed on the ground by the showman. I am of opinion that under the circumstances they are liable, but I rest my judgment solely on the ground that by the express terms of their agreement with him they retained the right of supervision and approval of the management and conduct of the show which they authorized him to give. For reward to themselves they licensed him to use and exhibit it on their grounds. It was not to be under his sole control and management and they assumed

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the duty to the public of seeing that whether from faulty construction or negligent use of his machine it should not be a source of danger to those who might be admitted to it: Garrett on Nuisances, 2nd ed. (1897), p. 223, and cases there cited. The provision which they exacted from the contractor for indemnifying them against accidents "caused by his negligence or in the giving of his said show," confirms this view, and suggests, moreover, that the show was one of the attractions permitted or provided by themselves for the public using their grounds though admission to it could only be obtained by the payment of a further small sum to the proprietor. A very cursory examination of the machine would have suggested to any one the extremely dangerous character of its construction for the purpose and to the extent to which it was manifestly intended to be used.

I think the appeal should be dismissed with costs.

GARROW, J.A.:—The question in the action is not as to the negligence of some one, which is admitted, but simply as to upon whose shoulders should rest the responsibility, upon those of Sprague & Co. or of the defendants, or of both. The learned Chief Justice in his judgment remarks that the case is near the line, that it involves difficult questions, but upon the whole he found for the plaintiffs, resting his findings apparently upon two grounds:

1. That the defendants were negligent in not having exercised competent supervision over the erection of the machine upon their premises in which case they must have discovered its unfitness, and;

2. Upon the ground that the machine was in the nature of a trap.

I agree with the learned Chief Justice in regarding the case as one of difficulty, differing as it does in its facts from all the numerous cases to which we were referred, in the important circumstance of the second enclosure and the payment of the second fee.

The legal duty of one inviting another to come upon his premises, to take reasonable care that the premises are in a reasonably safe condition is well settled.

There are in the case at bar apparently two questions, the first whether the small enclosure continued to be the "premises" of the defendants notwithstanding the agreement with Sprague & Co., and the second, the extent of the invitation created by the general admission to the park.

The first question is, I think, largely one of law—in other words of the proper construction of the before mentioned agreement—and the second is, I think, chiefly a question of fact.

As to the first, I cannot accede to the argument of Mr. Shepley that the agreement was in effect a lease, giving a right to exclusive possession to Sprague & Co. There is no demise of any land—no land is, in fact, described, so as to be ascertained, although this alone might not be sufficient if land had afterwards been pointed out and taken possession of by the tenant. But the intention of the parties at the time, as expressed in the instrument, is important where the matter is in doubt: see *Taylor v. Caldwell*, 3 B. & S. 826. And the extensive reservation of powers of superintendence and control, including cancellation, and the insertion of the covenant of indemnity are each and all circumstances of considerable, and combined, of conclusive, potency to indicate that a lease with the right of exclusive possession was not intended.

I think, therefore, that the instrument in question was clearly in law a mere license, and not a lease. But this conclusion is not in my opinion necessarily conclusive against the defendants, although it certainly tends towards a solution against them, for it might well be that, notwithstanding, the invitation did not extend to the use of the machine, and it is in this particular that I have found the greatest difficulty in reaching a solution entirely satisfactory to myself. Invitation is, as I have before pointed out, very largely a question of fact to be determined on the evidence. And the final question really is, was there under all the circumstances reasonable evidence from which the learned Chief Justice, or a jury, had it been before a jury, could have found in favour of the plaintiffs upon this question. If there was the judgment should stand unless it can be fairly regarded as against the weight of evidence.

So viewing the case I have come to the conclusion that there

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was such reasonable evidence, and I also think that the judgment of the learned Chief Justice is the correct result upon the weight of evidence. The machine, to begin with, stood upon the defendants' premises, placed there by and with their express license and consent and for their benefit, both direct and indirect. Their manager in the witness box speaks of it, quite correctly, as one of the "attractions": it may have been the main one to children like the infant plaintiff. The defendants undoubtedly expected and intended it to be used by its patrons exactly as the infant plaintiff was using it when injured, indeed it could only be reached at all by those whom the defendants had first invited or permitted to enter through the outer gates. The fact that they had reserved extensive powers of control and had taken a covenant of indemnity, is also significant on this subject, as well as upon the earlier one of lease or license. These circumstances all point, probably, towards ownership by the defendants, and certainly towards possession and power of control by them.

If they had been the owners of the machine, even if they had collected the additional fee for themselves, the original invitation would, I think, have clearly included the right to use the machine on payment of the additional fee, and if the machine, although not owned by them, had been placed by the owner or by an independent contractor where it was for the use of the defendants' patrons, the same result would, I think, follow: *Francis v. Cockrell* (1870), L.R. 5 Q.B. 184, 501. And the circumstance that the independent contractor, or the owner in this case, collected a small additional fee for his own use although certainly important is not, in my opinion, decisive against the plaintiffs' claim, but was simply a circumstance to be considered with the other facts in estimating whether or not under all the circumstances the defendants did or did not invite the infant plaintiff to use the machine in question.

I think the appeal fails and should be dismissed with costs.

MOSS, C.J.O., MACLENNAN, and MACLAREN, JJ.A., concurred.

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Feb. 2.

*Negligence—Crossing Railway—Looking Out—Whistling and Ringing Bell—Jury
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Plaintiff was driving a buggy on a road which crossed a railway. There was evidence that the night was very dark, the landmarks being undistinguishable; that he was watching to keep on the highway to avoid other vehicles, and was going faster than he thought he was, and not knowing he was near it, came on the railway crossing before he expected and was struck by a train, which had not given the statutory warning by blowing a whistle or ringing a bell, as it approached the crossing. There was also evidence that had he looked he might have seen the headlight of the advancing train, as the country was flat, and only one obstacle—an orchard and some trees near the crossing:—

Held, that the case should not have been withdrawn from the jury, and a nonsuit was set aside and a new trial granted.

THIS was a motion to set aside a nonsuit and for a new trial in an action against the defendant railway company for an accident at a railway crossing, where the plaintiff's buggy was struck by a train and damaged and the plaintiff hurt.

The action was tried at Sandwich on the 8th October, 1904, before TEETZEL, J., and a jury.

At the close of the plaintiff's case, *Riddell*, K.C., moved for a nonsuit, contending that it was the plaintiff's duty to stop, look and listen, and that the cases have already decided that he must look and listen; and referred to: *The Grand Trunk R.W. Co. v. McKay* (1903), 34 S.C.R. 81; *Nicholls v. The Great Western R.W. Co.* (1868) 27 U.C.R. 382; *Stubley v. The London & North Western R.W. Co.* (1865), L.R. 1 Ex. 13; *Skelton v. London & North Western R.W. Co.* (1867), L.R. 2 C.P. 631; *Cliff v. The Midland R.W. Co.* (1870), L.R. 5 Q.B. 258; *The Directors etc. of the Dublin, Wicklow & Wexford R.W. Co. v. Slattery* (1878), 3 App. Cas. 1155; *Winckler v. The Great Western R.W. Co.* (1868), 18 C.P. 250; *Coyle v. The Great Northern R.W. Co. of Ireland* (1887) 20 L.R. Ir. 409; *Curtin v. The Great Southern & Western R.W. Co. of Ireland* (1887), 22 L.R. Ir. 219; *Davey v. The London & South Western R.W. Co.* (1883), 11 Q.B. 213; *Giblin v. McMullen* (1868), L.R. 2 P.C. 317; *Ryder v. Wombwell* (1868), L.R. 4 Ex. 32.

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J. H. Rodd, for the plaintiff, contended that the cases cited on behalf of the defendants were cases happening in the day time; that the plaintiff did not act recklessly or foolishly and took all the care he could.

The learned Judge withdrew the case from the jury and granted the nonsuit in the following judgment:—

TEETZEL, J.:—According to the plaintiff's own statement, he did not look either to the right or to the left, having in his mind the danger of a train approaching, until he got on the track, until his horse, he says, was between the tracks and his rig on the track—first on the northerly track. He certainly, on further cross-examination, said he had never looked to the left at all, at any stage, until he got right on the track. He intimated, that he did look to the right, incidentally to his sitting on that side of the wagon and looking out for rigs ahead, but whether he was looking out for trains to the right does not appear very clearly. I think his evidence was very clear, the first portion of his evidence, and I do not think it was substantially qualified, that he had never looked to the right or the left, and had not trains in his mind, until he got upon the track.

He was well acquainted with the crossing, he knew the road very well, having travelled over it very frequently—sometimes once a week, sometimes oftener, sometimes only once a month. I should judge he had been many years familiar with the locality. He knew the distance from the turn on the River road, at the junction of the River road and the Luzon road—and it was about three-quarters of a mile from that point to the railway crossing. He knew, from his past experience, that there was a train going through about that time—but he says that he did not know that he was going so fast as he was apparently, and had not thought he was as near the track as he was, until he got upon the rails.

It is undoubtedly the duty of every traveller upon a highway, either in day light or in night time, but more especially at night time, to be careful in approaching a crossing, to look and listen for trains, and while it is true, that the law requires whistles to be blown within a quarter of a mile of the crossing

and the bell to be continuously ringing, and if the railway's servants neglect to do either of these acts and an accident happens through that negligence, the company is liable in damages, unless upon the plaintiff's own showing, the neglect on the part of the servants of the railway either to ring the bell or blow the whistle, while, being an act of negligence, was not in fact, the immediate and approximate direct cause of his misfortune—if it should appear by his own evidence he carelessly, or negligently, drove upon the track, regardless of the imminent danger to any one in approaching a railway crossing, does not look out for trains or listen, and is on the track before he makes any effort to look either way, and when he is on the track he is run over, I think it is quite clear that he should be—in such a state of facts—that he must be—regarded as the author of his own misfortune.

It is his duty, having regard both for his own interests and for the interests of the travelling public, to be on his guard and watchful, careful in approaching crossings, either by day light or at night, and more particularly at night.

And it does seem to me in the case of this plaintiff, being so familiar with the locality, admitting by his own evidence that he did not look out, did not listen, that that want of looking out and want of listening was the direct cause of his misfortune, because if he had listened he could clearly have heard the train approaching—and though it was a dark night, he could have seen the headlight.

The evidence is, that there was a clear view of at least one thousand feet—nothing obstructing the view for one thousand feet—east or west, north or south, and it seems to me, upon that state of facts—by his own shewing, that his carelessness in thus placing himself upon the track without any care whatever to locate where he was, or to locate the approaching train, was the direct and approximate cause of his injury.

It is very fortunate that he escaped with his life. It is remarkable that he did escape with such comparatively trifling injuries as he did suffer—but we have nothing to do with that.

In my opinion, upon his shewing, he has demonstrated such negligence on his own part as to deprive him of a right of action against the company, whether there is any evidence of

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the company's neglect of duty or not; that it was his neglect, the plaintiff's own neglect, to which was attributable—directly attributable, in my opinion—the injury which he suffered, and being of that view, I take the case from your consideration and direct the action to be dismissed.

If I am wrong the plaintiff has a recourse to a Divisional Court, in which case he will, if I should be wrong, in the ordinary practice be entitled to the expenses of this Court and of his motion to put me right.

But if I am right it would be improper, in my opinion, to submit the other questions—the question of whether the company was negligent or not—to the consideration of a jury.

From this judgment the plaintiff appealed to a Divisional Court and moved to set aside the nonsuit and for a new trial, and the motion was argued on the 31st of January, 1905, before BOYD, C., STREET and IDINGTON, JJ.

R. C. Clute, K.C., for the appeal. The question is, was the plaintiff bound to “stop, look and listen.” The evidence shews that the hour was late, the night was dark, the plaintiff was driving slowly and carefully and looking as well as he could, his view being obstructed by an orchard for 500 or 600 feet. There was no railway whistle or bell as the statute provides. On that evidence a Judge might have found one way and a jury the other. The consideration of the evidence is for the jury and the case should have gone to them: *The Directors, etc., of the Dublin, Wicklow & Wexford R. W. Co. v. Slattery*, 3 App. Cas. 1155 at p. 1165; *Morrow v. Canadian Pacific R. W. Co.* (1894), 21 A.R. 149; *Vallee v. Grand Trunk R. W. Co.* (1901), 1 O.L.R. 224; *Beckett v. The Grand Trunk R. W. Co.* (1886), 13 A.R. 174, at p. 182, affirmed (1886), 16 S.C.R. 713; *Johnson v. The Grand Trunk R. W. Co.* (1893), 25 O.R. 64 (1894), 21 A.R. 408; *Peart v. The Grand Trunk R. W. Co.* (1884), 10 A.R. 191; *Wakelin v. The London & South Western R. W. Co.* (1886), 12 App. Cas. 41; *Brown v. The Great Western R. W. Co.* (1885), 1 Times L.R. 406; *Wright v. Midland* (1885), 1 Times L.R. 406, note at 412; *Blake v. The Canadian Pacific R. W. Co.* (1889), 17 O.R. 177, at p. 181.

W. R. Riddell, K.C., contra. It may be that when the plaintiff proves negligence on the part of the defendants that he is entitled to go to a jury. He is not bound to prove no negligence on his own part, but if he does prove facts which shew negligence on his part there must be a nonsuit: *per* Lord Watson in *Wakelin v. The London & South Western R.W. Co.*, 12 App. Cas. at pp. 48, 49. Here the evidence shews the train came at the usual time and speed and could be heard a mile away and the plaintiff was not looking. In addition to the cases cited at the trial the following were referred to: *Cotton v. Wood* (1860), 8 C.B.N.S. 568; *Ellis v. The Great Western R.W. Co.* (1874), L.R. 9 C.P. 551, at p. 556; *Davey v. The London & South Western R.W. Co.* (1883), 12 Q.B.D. 70; *Johnston v. Northern Railroad Co.* (1874), 34 U.C.R. 432, at p. 439; *Railroad Co. v. Houston* (1877), 95 U.S.R. 697, at p. 702; *Gorton v. The Erie R.W. Co.* (1871), 45 N.Y. 660; *McGrath v. The New York Central R.R. Co.* (1875), 59 N.Y. 468, at p. 471; *Salter v. The Utica and Black River R.R. Co.* (1878), 75 N.Y. 273, at p. 281; *Butterfield v. Western R.R. Corporation* (1865), 10 Allen (Mass.) 532; *The Central Railroad of New Jersey v. Feller* (1877), 84 Pa. St. 226; *Moffette v. The Grand Trunk R.W. Co.* (1866), 16 L.C.R. 231; *Gardner v. Detroit, Lansing & Northern R.R. Co.* (1893), 97 Mich. 240, at p. 244; *The Delaware, Lackawanna & Western R.R. Co. v. Heffernan* (1894), 57 N.J.L.R. 149, at p. 153; *Merkle v. The New York, Lake Erie & Western R.R. Co.* (1887), 49 N.J.L.R. 473; *Gangawer v. Philadelphia & Reading R.R.* (1895), 168 Pa. St. 265. It is the duty of the Court to do what the Judge ought to have done at the trial; and if, at the close of the plaintiff's case, there was not evidence upon which the jury could reasonably and properly find a verdict for him, the Judge ought to have directed a nonsuit: *Giblin v. McMullen*, L.R. 2 P.C. 317, at p. 335.

Clute, in reply, cited *Solomon v. Britton* (1881), 8 Q.B.D. 176, cited in *Beckett v. Grand Trunk R.W. Co.* (1886), 13 A.R. 174, at p. 184.

February 2. BOYD, C.:—It is the duty of the traveller to exercise ordinary vigilance in approaching or crossing a railway: *Patterson, J.A.*, in *The Canadian Pacific R.W. Co. v. Fleming* (1893), 22 S.C.R. 33, at p. 44.

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This, rule recognized by the Supreme Court, was at an early stage formulated in a series of cases in this Province, *e.g.*, *Nicholls v. The Great Western R. W. Co.*, 27 U.C.R. 382. "There is a duty, incumbent on all persons driving or walking on a road crossed by a railway, dictated by common sense and prudence, that on approaching the crossing they should do so with care and caution." p. 393.

This is followed in *Johnston v. Northern Railroad Co.*, 34 U.C.R. 432, at p. 439 and in the last of the series *Miller v. The Grand Trunk R. W. Co.* (1875), 25 C.P. 389 Hagarty, C.J.: "Parties are bound to exercise every reasonable care and precaution in approaching and passing over level railway crossings, and are bound to exercise their ordinary powers of observation; and the omission to ring a bell or sound a whistle as directed by the statute, in no way releases them from the exercise of such care:" p. 396. Mr. Justice Gwynne also took part in the same judgment.

On the trial of these accident cases a question of much nicety often arises as to whether the damage has been caused by the negligence of the plaintiff (as shewn in his own case and by his evidence) in such a conspicuous manner as to warrant the interposition of the Judge in withdrawing the case from the jury and finding against the plaintiff.

The usual test in such instances is this, was the plaintiff so blameworthy, in exposing himself to danger that he might have avoided by ordinary diligence, as to disentitle him to recover, or can his lack of care be excused by the circumstances of the situation? It is a question of degree—the less or more—which may turn the scale for or against him.

The question is much discussed in view of the statutory duty put upon railways to give warning at crossings by whistle and bell by the Court of Appeal in *Peart v. The Grand Trunk R. W. Co.*, 10 A.R. 191.

The *Miller* case and others of that series are recognized as consistent with the *Peart* case by Osler, J.A., (for the Court) in *Weir v. The Canadian Pacific R. W. Co.* (1888), 16 A.R. 100, at p. 104. The same learned Judge referred to the *Weir* case in *Morrow v. Canadian Pacific R. W. Co.*, 21 A.R. 149, at p. 153, and pointed out that it was not a case of trial before a

Judge and jury in which the functions of the different parts of the tribunal must be regarded, but one in which the whole matter was tried by a Judge without a jury.

In the *Morrow* case, at page 154, it is said: It may appear in the course of the plaintiff's case that he was the author of his own injury; that he himself and not the defendants caused it, and then the Judge may properly nonsuit, or dismiss the action, not on the ground that the plaintiff was guilty of contributory negligence, but on the ground that he has failed to shew that it was the defendants' negligence which caused the damage.

This *Morrow* case was followed by the same Court of Appeal in the most recent reported decision: *Vallee v. Grand Trunk R. W. Co.*, 1 O.L.R. 224, and it is laid down that a person while absorbed in thought or conversation may approach too close to the railroad crossing, and if the statutory warning is not given, it then, in the event of an accident, becomes a question for the proper tribunal, whether that person's conduct has been such as to do away with the defendants' negligence and to interpose another cause for the accident, p. 225. Now the proper tribunal is not the Judge but the jury, if the facts are contradicted or contradictory, or it be a question of what is the proper inference from undisputed facts. This last case of *Vallee* gains in importance because leave to appeal therein was refused by the Supreme Court (p. 228 note).

It is worth while now to revert to the opinion of Mr. Justice Gwynne in the *Miller* case. I quote: "There was evidence that the morning was rather wild and blustering: that the wind, with snow, was blowing in the plaintiff's face; and that he had on a cap with ear-flaps, and also a comforter, as it was but reasonable he should have, to protect himself on a cold winter morning. There was also evidence that he approached the crossing at a walk (he was driving a team of horses), and that he heard no sound of bell or whistle; that he was looking out, but did not see the train until it was upon him.

"It could not be said, under the circumstances, as a point of law, that he had been guilty of contributory negligence. That was a question for the jury, unless it be an imperative duty imposed by law upon every person crossing a railway on a level to stop his horses, and to come to a complete stand-still before

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attempting to cross, whether he hears the sound of a bell or whistle, or not," at p. 397, 25 C.P.

The same learned Judge, Gwynne, J., in one of his last judgments reverts to the same subject in a judgment wherein he dissents from the Court: *The Lake Erie & Detroit River R.W. Co. v. Barklay* (1900), 30 S.C.R. 360, at p. 368. In his opinion, there was in that case not a particle of evidence reasonably to explain the apathetic conduct of the deceased; and it was then for the Judge to tell the jury, that upon the evidence the only conclusion that reasonable men could arrive at, was that the deceased by his own carelessness, indifference or recklessness had either wholly caused or had at least contributed to the causing of the collision which resulted in his death.

Now in the case in hand I am pressed by these authorities to say that there was something to go to the jury in regard to the degree of care exercised by the plaintiff.

The special features in this case are, that he was going home on a very dark night when the land-marks were undistinguishable, and he was watching to keep on the highway and avoid meeting any other rigs and, going faster than he supposed, he came upon the railroad-crossing before he expected to do so, and then found himself being closed upon by an express train, and before he could get his horses over the track his buggy was struck and smashed and he himself hurt.

The case made against the company in his evidence is that there was no sound of warning-signals as required by the statute.

The noise of the coming train might have been deadened by the rattle of his wheels, but had he looked, he might have seen the headlight of the advancing train—as the country is said to be flat and only one obstacle near the crossing in the shape of an orchard and some maple trees—but might he not be excused from looking out by the desire to keep in the road and avoid other vehicles which he might encounter? It is a narrow margin to work on, but I think the better opinion in the cases which bind us is that the jury should pronounce upon this.

The case should be remitted for full trial and the company who insisted on nonsuit should pay the costs thereby lost and incurred on this appeal.

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STREET, J.:—This action is brought to recover damages for injuries sustained by the plaintiff at a highway crossing of the defendants.

The plaintiff was driving in a southerly direction at night, along a road called the Luzon Road, which crosses the defendants' line at a right angle. The carriage in which he was driving was struck at the crossing by an express train of the defendants from the east, the plaintiff being thrown out and injured and his carriage damaged.

At the close of the plaintiff's case the learned Judge, upon the application of counsel for the defendants and after hearing very full arguments on both sides, determined that there was no evidence to be submitted to the jury and dismissed the action. The grounds upon which he decided are fully set out in the judgment delivered at the time.

For the purposes of this appeal, we must assume in favour of the plaintiff that the defendants failed to give the statutory warning as they approached this highway by sounding the whistle and ringing the bell of the engine.

The evidence shews, however, that for a distance of about one thousand feet to the east of the crossing, there was no obstruction of any kind to hinder the view of a train coming from that direction as the train in question was.

The plaintiff says that he neither saw nor heard the train approaching until he found himself actually crossing the track, immediately before he was struck, when it was too late to avoid it. He says that the night was so dark that he could not even see the fences at the side of the road, and that he mistook his position in consequence and supposed that he was still some four hundred feet away from the railway track, when he found himself upon it. His evidence as to whether he was or was not keeping a lookout is very confused and contradictory. It seems plain, however, that he must have seen the train had he been at all on the alert. There is some evidence that the cover of the carriage in which he was sitting was up, and this may

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have prevented his seeing the train. Under these circumstances we are to determine whether the nonsuit was right. Has the plaintiff adduced evidence, which should go to the jury, not only that the defendants were negligent, but that the injury he received is attributable to their negligence? If he has failed to do so the nonsuit was right.

The case of *Wakelin v. The London & South Western R.W. Co.*, 12 App. Cas. 41, which was relied on by both parties, does not determine the case before us. The House of Lords there merely held that the fact of the dead body of a man having been found on the tracks of the defendants at a level crossing, and that he was killed by one of their trains, was not sufficient to make them liable in damages for having caused his death, even assuming negligence on their part, for the reason that there was no evidence to connect his death with their negligence.

The negligence assumed by the Court there for the purposes of their judgment, was, that the train did not whistle or give any warning of its approach except by carrying the usual head-light. There was, however, no statutory duty to whistle for the crossing. The decision of the Court in the defendants' favour was placed upon the simple ground, that, assuming the plaintiff to have proved negligence on the part of the defendants, he had not given any evidence to shew that the negligence was the cause of the accident.

In the present case the plaintiff has proved negligence on the part of the defendants, and he has connected their negligence with his injury by saying, that if they had given the statutory warning he would probably have heard it and so avoided the accident. There is, therefore, a distinction in this respect which prevents the decision in the *Wakelin* case from being a guide to us.

In my opinion, we are clearly bound by the authorities to leave to the jury upon the facts in evidence the question, whether the reason given by the plaintiff for his not having seen the train, is a sufficient one. It is for them to determine whether the plaintiff exercised reasonable care under the circumstances. There are numerous *dicta* in the cases which cover the point, but the late case of *Vallee v. Grand Trunk R.W. Co.*,

1 O.L.R. 224, seems to me decisive upon the question which arises here. The authorities appear to have gone this far: that where the railway company fails to give the statutory warnings of the approach of a train and an accident happens, the plaintiff is entitled to have the opinion of the jury upon any reasonable excuse given for the omission to look out for the approach of the train and the Judge cannot pass upon the sufficiency of the excuse himself. In the *Vallee* case the person injured was a woman, who knew she was approaching a crossing and might have seen the train at a distance of six hundred feet; she admitted that she knew she was close to a railway and that a train was to be expected, and did not look out for it, but excused herself for not having looked out for it by stating that she was driving a restive horse. There was evidence that the statutory warnings were not given by the train. A nonsuit was asked for and refused and the Court of Appeal sustained a Divisional Court in holding that the case could not have been withdrawn from the jury.

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In my opinion, the excuses offered by the plaintiff in the present case for his omission to see the approach of the train in time to avoid the accident should not, in accordance with the authorities, have been withdrawn from the jury. The judgment for the defendants should, in my opinion, be set aside and a new trial ordered, and the defendants must pay the costs of the former trial and of this motion.

IDINGTON, J.:—In support of the defence of contributory negligence the evidence must, before the case can be withdrawn from the jury, be of that clear and uncontradictory character that a finding by the jury thereupon for the plaintiff could not be allowed to stand.

The only evidence of such negligence here is that furnished by the plaintiff.

It is not clear—it is, in regard to the point of looking and listening, contradictory. In such a case it is for the jury, who are judges of the facts, to determine which state of facts the witness has given as the truth, is to be followed.

I might, if passing upon the plaintiff's evidence, feel inclined

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to accept the learned trial Judge's inferences of fact as to the looking for a train.

There is no rule of law that a traveller must look and listen at a crossing for a coming train—other things must be considered.

The conditions surrounding a traveller at a crossing may be such that if he neither look nor listen and meet with injury there from a passing train, he may, by reason of such failure to look or listen, be in law deprived of any right of action resting upon the negligence of the railway company operating such a train.

The conditions under which plaintiff approached the crossing here in question fall, I think, far short of being such that the trial Judge could, without leaving the case to the jury, find that this supposed case existed here.

The night was dark—the plaintiff was looking ahead. And he swears he “aimed to look sideways for the white fence—but the white fence was not there”—I take it that there was a white fence at the crossing, but the night was so dark that he missed seeing it.

He says over and over in ever so many ways that he did not know he was near or up to the railway crossing till his horse struck the track.

He says, “I was driving my horse, and looking over my horse watching for rig that might come against me, and I couldn't tell whereabouts I was—it was so dark I couldn't keep track . . . it was very dark and I was driving slow, and look ahead of my horse, the side of my horse . . . and I got on the track before I thought I was there, sooner as I thought I would be there—then my accident came,” and as to the bells or whistle one might expect to hear from the train approaching, he says “No sir. Nothing at all—I had no alarm to give me a chance. . . . None whatever . . . No bells—no whistle,” and as to thinking of the possibly approaching train, he says, “I knew I was going to come to a crossing. Q. I am asking you, did you think about that train? A. The same thing—the crossing—I thought about the train. . . . How far did you think you were from the track? A. I thought I had maybe two acres more to go.”

A good deal appears in the evidence that may be urged as somewhat inconsistent with some of these statements.

But with these statements appearing in the evidence, and having regard to the law as laid down in *Vallee v. Grand Trunk R.W. Co.*, 1 O.L.R. 224, by the Court of Appeal, I do not think the case should have been withdrawn from the jury.

I think there should be a new trial, and that defendants, who pressed for a dismissal, should bear the costs of the last trial and of this application.

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[IN CHAMBERS.]

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RE WEST HURON PROVINCIAL ELECTION.

March 2.

Parliament—Election—Recount—Ballots—Mistaken Initials Endorsed—Torn Ballot—Two Adhering as One—Marked with Numbers in Poll Book.

On a recount of ballots the county Judge having found that three ballots marked as delineated, in the judgment, were good, and that the letters "B.S." on the back of a ballot were placed there by the deputy returning officer by mistake for his own initials "R.S." and that the validity of that ballot was saved by sub-sec. 3 of sec. 112 of R.S.O., 1897, ch. 9, his decision was affirmed on appeal.

A ballot torn in two and pinned together, no part of it being absent or wanting, held, a good ballot.

Re West Huron (1898) 2 Elec. Cas. 58 at p. 62 distinguished.

Two ballots, consecutive in number, were supposed to have been handed to a voter sticking together as one, with the deputy returning officer's initials on the lower one, and the voter was supposed to have marked the upper one, not initialed, which was not discovered until the counting of the votes:—

Held that the ballot marked but not initialed was properly rejected.

Held, also, that ballots marked on the back with the number in the poll book opposite to the name of each voter were properly counted.

Re Russell (2) (1879), H.E.C. 519 followed.


THIS was an appeal from the judgment of the Judge of the county of Huron on a recount of ballots, which was argued the 25th February, 1905, in Chambers, before MACLENNAN, J.A. in whose judgment the facts are stated.

E. L. Dickenson, for the appeal.

H. M. Mowat, K.C., and *J. L. Killoran*, contra.

March 2. MACLENNAN, J.A.:—The appeal was limited to six ballots, No. 5358 not counted for Holmes; Nos. 3189, 4183, 9493, 7699 and 6084, counted for Cameron; and all the ballots in polling sub-division No. 4, Goderich.

Three of these ballots were in the following form:

3189	1	CAMERON.	
	2	HOLMES.	

4183	1	CAMERON. &	MacIennan, J.A. 1905 RE WEST HURON PROVINCIAL ELECTION.
	2	HOLMES.	
9493	1	CAMERON. X	
	2	HOLMES.	

The only question as to 3189, 4183, and 9493, is the sufficiency of the mark as a cross, and I think the learned Judge was clearly right in holding the marks sufficient, and the ballots valid.

The objection to No. 6084 was that the initials of the deputy returning officer on the back were the letters B.S. instead of R.S. The learned Judge came to the conclusion that the initials were placed thereon by the deputy returning officer and were in his handwriting, and that B. was a mistake for R.; and that the validity of the ballot was saved by sec. 112 (3) of the Act, R.S.O. 1897, ch. 9. I cannot say that his conclusion of fact is wrong, and I must therefore affirm his decision.

No. 7699 was objected to on the ground that when produced it was found to be torn in two along an irregular line, lengthwise of the ballot, and the two parts were pinned together, no part of the original ballot being absent or wanting. In all other respects it was perfect, and properly marked for Cameron.

The learned Judge says: "This ballot bears evidence that it was folded up in many narrow folds, and I infer that it was torn, in opening it, by the deputy returning officer, on going to count the ballots at the close of the poll, and in presence of the agents, who seeing how it happened made no objection to it."

The case differs from that of *West Huron* (1898), 2 Elec. Cas. 58, at p. 62, where a substantial part of the ballot, the part having the official number upon it, had been torn off and was wanting, and is more like *Re West Elgin* (No. 1) (1898), 2 Elec. Cas. 38; and see *Woodward v. Sarsons & Sadler* (1875),

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L.R. 10 C.P. 733; and *Re Monk* H.E.C. 725, at p. 734. I affirm the learned Judge's decision as to this ballot.

No. 5358 was marked for Holmes but had not the initials of the deputy returning officer on the back.

It was rejected by the deputy returning officer, and returned in a rejected ballot envelope. There was another ballot, No. 5359, in the same division, which was not marked for either candidate, but had the deputy returning officer's initials endorsed thereon. This ballot was returned in the spoiled ballot envelope, but is not marked cancelled as required in such a case by sec. 109. Nor does it appear that the counterfoil was similarly marked.

Both parties suggest that inasmuch as 5358 and 5359 are consecutive numbers the deputy returning officer must by mistake have torn both off the counterfoils at once, have put his initials on the lower one of the two, and have handed both to the voter, who without observing that there were two, marked the upper one.

The appellant suggests that the mistake was discovered when the ballots were about to be placed in the box, and that 5358 was then put in the box, 5359 put aside as spoiled, and put in the spoiled envelope.

The respondent on the other hand suggests that the voter folded both ballots as directed by sec. 103, delivered them so folded to the deputy returning officer, who without unfolding or discovering that there were two ballots deposited them both in the box.

The learned Judge's statement and finding is as follows:

"Mr. Dickenson contended that as 5359 was returned as a spoiled ballot it must be so regarded, and could not have gone into the ballot box. He suggests that these two ballot papers were handed out by the deputy returning officer as one ballot paper, adhering together, which accounts for the initials of the deputy returning officer being endorsed only on the back of 5359, and not on 5358: that possibly the voter when marking discovered the fact and returned 5358 marked on the face for Holmes, and it was put in the box, and the other paper 5359 must have been handed by him to the deputy returning officer who then put it in the spoiled ballot envelope in which it was

returned. In this polling division 111 persons voted, and 112 ballot papers were returned by the deputy returning officer including 5358 and 5359, and Mr. Dickenson contends that, treating 5359 as a spoiled ballot, 5358 is necessary and must be counted to equal the number of voters."

"In the absence of evidence, I do not find as a fact, that the spoiled ballot paper 5359 was in the ballot box, but from the fact that it bears no mark of any kind that could be said to spoil it, and is not mutilated, and as 5358 was undoubtedly found in the ballot box without the initials of the deputy returning officer, and as they are consecutive numbers, I infer that they must have adhered together, and have been given out as one ballot, and as such went into the ballot box, and were found to be two ballot papers at the close of the poll, which made one ballot too many, and that the deputy returning officer following sec. 112, sub-sec. 1, rejected 5358 as not bearing his initials; and as I felt bound by the same section, I felt it my duty under that section to reject 5358 and to count 5359 as one of the ballots cast."

I have felt a desire, if possible, to allow this ballot, fairly and honestly marked by the voter for the candidate of his choice.

Even if he noticed that there were two papers, he may have thought that was the proper method of voting, having received them both from the deputy returning officer. He therefore complied with sec. 103, folded them across so as to conceal the names of the candidates and the mark on the face of the paper, and so as to expose the initials of the deputy returning officer and the number on the back, and delivered them so folded to the deputy returning officer. The folds of both papers correspond exactly, shewing that he must have done all that.

The same sec. 103 required the deputy returning officer, when the ballot was delivered to him, to deposit it in the ballot box, *without unfolding it*, or in any way disclosing the names of the candidates, or the mark made by the elector. His duty is merely to verify his own initials and the number on the back of the paper, and he is expressly forbidden to unfold it.

I am therefore compelled to agree with the inferences of the learned Judge, that both papers folded together were placed

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in the box by the deputy returning officer, and that when the ballots were counted at the close of the poll, No. 5358, although properly marked, being found without initials, had to be re-rejected, as required by sec. 112. I have considered whether these papers could not be treated as one ballot, and be allowed; but I think I may not do that. That would be to condone the error of the deputy returning officer, and to encourage laxity in the discharge of an important public duty. The ballot must be held to have been rightly rejected.

The remaining objection is as to the ballots in polling sub-division No. 4, Goderich.

The contention was that all those ballots should have been rejected, for the reason that they were all marked on the back with the number in the poll book opposite to the name of each voter, and that by that means the identity of each voter could be discovered.

The learned Judge came to the conclusion that the numbers were placed on the ballots by the deputy returning officer, and that the case was governed by sub-sec. 3 of sec. 112, and that the validity of the ballots was not thereby affected.

The learned Judge had ample evidence before him to enable him to judge, whether the numbers had been placed by the deputy returning officer or his poll clerk, evidence which I have not before me, the appeal being a limited one, and I cannot review his decision on that question of fact.

This objection was not urged before me with much confidence; nor could it be, having regard to the decision in *Re Russell* (2) (1879), H.E.C. 519, which decides the very point involved.

The appeal fails on all the grounds of objection, and I think must be dismissed with costs.

G. A. B.

[STREET, J.]

HIME v. LOVEGROVE.

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May 6.

Vendors and Purchasers—Covenant—Building Restriction—House—Stable.

The owner of two adjoining parcels of land sold and conveyed one, the deed containing a covenant by the purchaser for himself, his heirs, executors, administrators and assigns not to "erect or build more than one house upon the property hereby conveyed;" with special provisions as to the cost and materials of "any house so erected," and as to the distance of its walls from the boundaries of the parcel conveyed. The vendor subsequently conveyed his parcel to the testator of the plaintiffs, having first erected a stable upon it. The parcel first sold by him became vested by various mesne conveyances in the defendants who built a stable upon part of it, sufficient space being left within the prescribed boundaries for the erection of a house of the nature and value provided for in the covenant, and such a house the defendants asserted they intended to build:—

Held, that the burden and benefit of the covenant passed with the respective parcels; that the covenant operated only as a restriction against the building of more than one house upon the property in question; that it was not wide enough to prevent the building of a stable as appurtenant to a house; that this being so there was no reason why the stable should not be built first and the house afterwards; and that, apart from the construction of the covenant, the original vendor having himself built a stable on his property the right to complain of the building of a stable on the adjoining property was gone.

ACTION tried at Toronto on the 4th of May, 1905.

Allan Cassels, for the plaintiffs.

James Bicknell, K.C., for the defendants.

The facts appear in the judgment.

May 6. STREET, J.:—On the 1st of December, 1886, George Evans, being the owner of two adjoining parcels of land on Wellington Place, in Toronto, conveyed one of them to one Norman B. Dick. The parcel retained by the grantor was occupied by him, and upon it he had erected a house costing some \$10,000 or \$12,000, in which he lived. The parcel conveyed to Dick was vacant, and had formed part of the garden attached to the other parcel. The conveyance to Dick was executed by him, and contained a covenant by him in the following words: "The said party of the third part hereby covenants, for himself, his heirs, executors, administrators, and assigns, that he or they will not, nor will they or any of them, permit any person whomsoever to erect or build more than one house upon the property hereby conveyed, and that any house

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so erected shall be of brick or stone, or partly of brick and partly of stone, and shall cost not less than \$5,000; the southerly wall of such house not to be nearer the northerly limit of Wellington Place than the southerly wall of the house at present occupied by the party hereto of the first part, immediately east of the property hereby conveyed, and no part of the wall or walls of any house built upon the said lands to be nearer than ten feet from the westerly wall of the house at present occupied by the party hereto of the first part as aforesaid."

In 1888 George Evans conveyed to one H. L. Hime the parcel retained by him, and it is now vested under the will of Hime in the plaintiffs, subject to certain mortgages created upon it by Hime in his lifetime.

The defendants, by various mesne conveyances, have become and now are the owners in fee of the parcel conveyed by Evans to Dick.

In July last the defendants began the erection of a stable and drive house towards the rear-end of their lot, made of brick, and had the walls about two-thirds completed when they were notified by the plaintiffs that its erection was a breach of the covenant of Dick, their predecessor in title; and upon their continuing the building, the present action was brought asking for an injunction to restrain them from proceeding with its erection, and for damages, and by amendment for an order requiring them to take it down.

No motion for an interim injunction was made, and the defendants completed the stable and drive house, and have used it as a stable for two or three horses and a couple of waggons, and they have stored some cement in the drive house. The defendants carry on the business of putting down cement walks, and are using the stable and the cement stored in it in connection with their business. They both swore that the lot was purchased with the intention of erecting upon it a dwelling-house for the defendant Lovegrove, which should comply with the terms of the covenant, with the stable and drive house in the rear. There was plenty of room between the stable and Wellington Place for the erection of such a house, as well as for

the space between its front and Wellington Place required by the terms of the covenant. The easterly wall of the stable was more than ten feet distant from the line of the westerly wall of the house on the plaintiffs' lot. After the conveyance from Evans to Dick, a stable was built by Evans or Hime upon the rear end of the lot retained by him.

The character of the neighbourhood as a residential part of the city has changed materially since the date of the conveyance from Evans to Dick, and a number of factories of various kinds have grown up in the neighbourhood, some of the larger dwellings having been converted into factories. The house on the lot retained by Evans has ceased to be a private residence within the last two years, and has been converted into two flats.

I think it must be held, under the circumstances of this case, that the burthen of the covenant passed with the land to the defendants, and the benefit of it to the plaintiffs: see the cases of *Renals v. Cowlshaw* (1878), 9 Ch. D. 125, at p. 130; and *Rogers v. Hosegood*, [1900] 2 Ch. 388, where the question is very fully discussed.

The covenant, however, should not be extended beyond what its terms may be held reasonably to import. The purchaser is not to build more than one *house* upon the property: this is the sole restriction upon what he may do as to building, except that any *house* built upon the lot is to be of brick or stone, and to cost not less than \$5,000. If the defendants had built a dwelling-house upon the lot, complying with the terms of the covenant, they could not, in my opinion, have been restrained from afterwards adding a stable and carriage house, for the covenant seems to be aimed at preventing the erection of more than one dwelling-house upon the land. The covenantee himself built a stable upon his lot after the making of the covenant, and without express words applying clearly to a stable, he could not have complained of his grantees for doing that which he himself had done.

If the defendants could build a house first, and then add a stable, without breach of the covenant, I see no reason why

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they should not begin by building the stable and afterwards building the house, as they swear it is their intention to do: see *Russell v. Baber* (1870), 18 W.R. 1021; *Bowes v. Law* (1870), 18 W.R. 640.

I think there is no breach of the covenant in what has been done, and the action must be dismissed with costs.

R. S. C.

[DIVISIONAL COURT.]

TATTERSALL V. THE PEOPLE'S LIFE INSURANCE COMPANY.

D.C.

1904

Life Insurance—Thirty Days' Grace—Condition as to Payment of Premium Within—Estoppel—Beneficiary—Insurance Act, R.S.O. 1897, ch. 203, sec. 148 (1).

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Feb. 17.

An insurance for \$4,000 in the defendant company effected on the life of the plaintiff's husband and payable to her, was some time afterwards, in consideration of an annuity of \$1,500, made payable to her, assigned by her to her husband with a proviso that if he predeceased her, such annuity was to be a charge on the proceeds. By one of the conditions thirty days' grace for payment of a premium was allowed, if the insured were unable to do so when it became due, which the plaintiff stated was the fact, while by sec. 148 (1) of the Insurance Act, R.S.O. 1897, ch. 203, payment of any premium, not being an initial premium, might be made, within thirty days after becoming due, by the insured or her beneficiary under the contract, when it would *ipso facto* be revived or renewed, any stipulation to the contrary notwithstanding. The insured died about ten days after a premium had become due, leaving it unpaid. A firm of solicitors, acting for the insured's family, at once notified the company of the death, and not knowing whether or not the premium had been paid, but, thinking that payment might have been overlooked, asked, if it had not, to advise them, and they would pay it. Subsequently on the same day, the plaintiff called at the head office and saw the secretary, who, with full knowledge of the fact of such non-payment, stated, in answer to her enquiry, that the policy was all right, so far as he knew. The solicitors' letter had been handed over to the company's solicitor with instructions to answer it, which he did, by merely asking them to send in proofs of loss, and that the matter would receive prompt attention, making no answer to the enquiry as to non-payment. Administration was taken out by the plaintiff and proofs duly furnished, and it was not until some months afterwards, on the solicitors' enquiring when the amount of the policy would be paid, that they were informed that the company contested payment for non-payment of the premium;—

Held, that the plaintiff was a beneficiary under the contract and entitled to make a claim under the policy; and that the company were estopped by their conduct from setting up the non-payment of the premium.

THIS was an action tried before IDINGTON, J., and a jury, at Toronto, on October 20, 1904.

W. R. Riddell, K.C., and P. D. Crerar, K.C., for the plaintiff.

James J. Warren, for the defendants.

The action was brought on a policy of insurance for the sum of \$4,000 in the defendants' company, effected by one Richard Brooke Tattersall, on his life, on the 13th April, 1901, payable to his widow, Florence Amelia Tattersall, the plaintiff or in the event of her prior death, then to his executors,

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administrators or assigns, upon satisfactory proof at the company's head office of the death of the insured during the continuation of the policy.

The last premium fell due on the 10th April, 1903, and was not paid.

On 19th December, 1902, the wife had, in consideration of his granting an annuity of \$1,500, assigned all her interest in the policy to her husband, but on the condition that if he predeceased his wife the policy and the proceeds thereof should be charged with the payment of the annuity.

The insured died on the 22nd April, 1903, intestate.

The policy contained the following conditions amongst others: "5. Thirty days' grace will be allowed for payment of renewal premiums if the insured be unable to pay them when due"; "6. That if any premium . . . be not paid when due, this policy shall be utterly void"; "8. From any sum payable under the policy the company may deduct any lien that may be standing against the policy, and the balance, if any, of the annual premium from the then current policy year." "10. No condition of the contract can be changed, waived or altered, except in writing signed by the president, manager or secretary of the company."

By The Insurance Act R.S.O. 1897, ch. 203, sec. 148 (1), it is enacted "In any insurance of the person, where the money payable by way of premiums, dues or assessments (not being the initial premiums, dues or assessments) under any contract whatsoever, is unpaid, any of the persons hereinafter mentioned may within thirty days from and including the first day on which the money is due, by registered letter or otherwise, pay, deliver, or tender to the company at its head office, or at its chief agency in Ontario, or to the company's collector or authorized agent, the sum in default. On payment, delivery or tender as aforesaid, by the assured, or by any of the beneficiaries under the contract, the contract shall be deemed to have been *ipso facto* revived or renewed, and any stipulation or agreement to the contrary shall, as against the assured or his beneficiaries be utterly void, the thirty days hereinbefore mentioned, shall run concurrently with the period of grace or credit (if any) allowed by the insurer for

the payment of a premium or of an instalment of premium, and nothing herein contained shall be deemed to extend the period of grace or credit beyond the total of thirty days. This subsec. shall not be deemed to extend the time allowed for the payment of contributions or assessments by sec. 165 of this Act."

The plaintiff at the time of the insured's death was in New York. She at once came to Toronto where the head office of the company was, and, on the 24th, called at the head office. She saw Mr. Joliffe, the secretary of the company, and asked him if he had received notice of the death of her husband, when he said that he had received notice that morning from Messrs. Crerar & Crerar of Hamilton. It appeared they had acted for the deceased during his lifetime, and were now acting for his family in England. She asked Mr. Joliffe if the policy was all right, and she said that his answer was, that in so far as he knew, it was; that nothing was said by Mr. Joliffe of there being an overdue premium, and that she had no recollection whatever of his saying that the claim would have to be referred to the solicitor. The plaintiff stated that her husband was not in a position to pay the premium when it fell due.

Mr. Joliffe, the company's secretary, denied that he had said that the policy was all right, but that what he did say was that the last premium had not been paid, and the matter would be referred to the company's solicitor. He said that the company approved of all that had been done with regard to the matter.

Messrs. Crerar & Crerar's letter was as follows:

Hamilton, 23rd April, 1903.

The Manager,

The People's Life Insurance Co., Toronto, Ont.

RE POLICY 2262 R. B. TATTERSALL.

Dear Sir:—

We have to advise you that Mr. R. B. Tattersall, the insured named in the above policy, died yesterday at Toronto. The policy is by the terms of it payable to his wife, but a month ago an arrangement was made for the assignment of the benefits of the insurance to the insured himself. We enclose herewith a duplicate copy of the assignment. We observe that a premium fell due on the 10th instant. We had not heard that Mr Tattersall was ill, and the last time the

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writer saw him about three weeks or four weeks ago, he seemed in good health, but it is possible he may have been ill for a week or two, in which case payment of the premium may have been overlooked. If it has not been paid let us know, and we will see to the payment of it.

Yours truly,

CRERAR & CRERAR.

The secretary said he handed this letter to their solicitor, with instructions to answer it. The solicitor, who was aware that the premium had not been paid, wrote as follows:

Toronto, April 28, 1903.

Messrs. Crerar & Crerar,
Barristers, etc., Hamilton.

RE POLICY 2262 TATTERSALL.

Dear Sirs:—

The People's Life Insurance Company have handed your letter of the 20th instant, enclosing duplicate copy of assignment of the above policy. If you will send into the company the ordinary proofs of death, the matter will receive prompt attention.

Yours truly,

JAMES J. WARREN.

Messrs. Crerar & Crerar then wrote to the solicitor asking for blank claim proofs, which the solicitor procured from Mr. Joliffe and forwarded to them. Messrs. Crerar & Crerar had the proofs duly filled in and signed, and forwarded them to the company.

They subsequently, at the defendants' request, procured certificates of the insured's age, statements of attending physician, undertaker and minister, which were duly forwarded.

On July 7th the secretary wrote Messrs. Crerar & Crerar asking to be supplied with proof as to whether deceased left a will, etc. To which they replied that deceased left no will, but that the widow, the plaintiff, was taking out letters of administration; and, on August 14th, they enclosed letters of administration which had been granted to the plaintiff, and asked when they might expect payment of the policy.

On August 21st they received a reply from the solicitor that the company had handed him the proofs of death, and asked him to advise them as to their liability, and that he had advised them that they were not liable because the insured died when in default in respect of a premium, and that the company had instructed him to so advise them.

Further correspondence then ensued, Messrs. Crerar & Crerar contending that the plaintiff had been misled by the course pursued by the company, and on the company persisting in their refusal to recognize the plaintiff's claim, this action was brought.

The learned Judge left the following questions to the jury :

1. Did the plaintiff on the 24th April, 1903, ask the secretary of the defendant company whether or not the policy in question was all right, and did he reply that it was so far as he knew ? A. Yes.

2. Did the secretary know when he made this reply that the renewal premium in question had not in fact been paid ? A. Yes.

3. Did the secretary intend that the plaintiff should rely upon the assurance thus given ? A. Yes.

4. Did the plaintiff rely upon the assurance thus given ? A. Yes.

5. Did the secretary tell the plaintiff on the same occasion that the renewal premium had not been paid, and that the effect of such default would be referred to the defendants' solicitor ? A. No.

6. Did the defendants, through their secretary, or otherwise, entrust wholly to their solicitor the reply to the Crerar & Crerar letter of 23rd April, 1903, to the defendants ? A. Yes.

7. Did the defendants' solicitor reply, pursuant to such instructions, by the letter of the 26th April, 1903, and did the letters of the 29th and 30th April pass in ordinary course thereafter ? A. Yes.

8. Did the defendants say or do anything further in the way of reply to the said enquiry as to the payment of the premium within thirty days from 10th April, and, if so, what ? A. No.

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9. Did the plaintiff, through their solicitors, Crerar & Crerar, or otherwise, rely upon the failure to answer, and the furnishing of blank forms of proof, as an assurance that the payment had been made? A. Yes.

10. Were the solicitors, Crerar & Crerar, misled thereby? A. Yes.

11. Were the solicitors prepared to pay the amount of the renewal premium if answer had been made by or on behalf of the company that no payment had been made? A. Yes.

12. Did Mr. Warren state to the plaintiff upon the occasion in his office that it was a pity she did not pay the premium when she was told by Mr. Jolliffe it was unpaid. No answer.

The learned Judge subsequently delivered the following judgment:

October 21st, 1904. IDINGTON, J.:—The plaintiff is the widow of the late Richard Brooke Tattersall, who, on the 13th April, 1901, had his life insured by the defendant company for the amount of \$4,000, which was to be paid to Florence Amelia Tattersall, the present plaintiff, then his wife. He had paid all the premiums except the last one.

If nothing more had happened, the plaintiff would have been entitled to claim under the section of the statute giving the right to a beneficiary to tender, after the death, the amount of any premium unpaid, were it not for an assignment made by her to her husband and the settlement upon her which appear in evidence. I am not sure that these documents made any difference in regard to the position of the plaintiff. It may, when we come to consider the effect of the facts on which the jury has found, render the legal position more simple than it otherwise might appear if she is driven to rely upon her position as administratrix. In the one case—if she were a beneficiary under the statute—she would have been entitled as of right to have gone, on the 24th of April, immediately after her husband's death, and asked about the policy and ascertained from the company the exact position in which it stood. If she had to claim as administratrix, different considerations might arise in law; for she was not when she went to the company's office the administratrix, and the solicitors who were acting for her

afterwards were merely solicitors for the estate (as they express it) before the administration could have been granted. It is possible that letters of administration would relate back to the period of death, so that it would be a matter of no substantial difference in consideration of the question whether she is looked upon as a widow claiming under the policy, or as administratrix. In either view of her position I think the plaintiff is entitled to succeed by virtue of the answers to the questions which I have submitted to the jury.

By way of defence it is set up that under the terms of the contract between the parties, upon the death of the said Richard Brooke Tattersall, as set out in the statement of claim, all liability ceased, the premium not having been paid before the death of the said Tattersall, and also upon the death of the said Tattersall, under the contract and under the laws of the Province of Ontario, it was not possible to renew or revive the contract by the tender of the money; because there was no beneficiary under the contract who could make the tender provided for by the statute, and the defendant having died in default, and no tender having been made by any person within the period of thirty days, the defendants are not liable.

In the view I take of this contract and the findings of the jury I do not find it necessary to determine exactly the meaning of conditions 5 and 6 endorsed on the policy and on which the defendants are relying. I do not think that the case of *Manufacturers Life Ins. Co. v. Gordon* (1893), 20 A.R. 309 relied upon, decides this case. I think the conditions there in question are manifestly distinguishable from those in question in this case. It may be that the contract in this case might well be held to be a contract to pay if the premiums as they fell due were paid, or if death took place within the thirty days grace given by condition 5 that the policy then became payable without any tender whatsoever. The contract may, as to these conditions, be given all the effect that the defendants contend for, and yet in either of the alternative ways of looking at it I think the findings of the jury estop the defendants from setting up either of those conditions

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It was put forward in argument that condition 10, which reads, that no condition of the contract can be changed, waived or altered except in writing signed by the president, manager or secretary of the company, precluded the possibility of any effect in law being given to the conduct of the defendant's secretary, or the defendant's secretary and solicitor in regard to the way in which they answered the enquiry which was made relative to the non-payment of this premium. This condition is not pleaded, and no application to amend the pleadings was made, though objection was taken that the benefit of that condition was not claimed by the pleadings.

I am clearly of the opinion that the answers to the questions submitted to the jury are warranted by the evidence in the case, and that those answers entitle the plaintiff to succeed if and so far as the case turns or may turn on the question of estoppel.

I have some difficulty in regard to the facts bearing upon the question raised by the 5th condition. That condition seems to extend the thirty days of grace to payments of renewal premiums only in case the insured be unable to pay them when due. The evidence as to the insured's financial condition, if that alone is what is to be taken into consideration in interpreting the words "unable to pay" was of a meagre character. He was a man following no occupation, dependent entirely upon allowances from home, and in arrear to his wife under the settlement he had made, as appears by the documents filed and referred to here. I would infer, and, so far as necessary, do infer, and find as a fact, based upon such evidence as there is, that he was unable, at the time of the last renewal premium falling due, to pay the same, by reason of his financial condition at the time.

Another question necessary to be considered is whether or not the secretary and solicitor, in giving the plaintiff the answers upon which she relied, and upon which the jury has found she did rely, were acting within the scope of their authority from the defendants, or within the apparent authority that the defendants had given them, so as to entitle the plaintiff or her solicitor to ask for the information and get the answers. This point was suggested by me at the close of the case and

authorities were asked for; but no authorities on the subject have been referred to except by counsel for the defendants, who cited *Hyde v. Lefaiivre* (1902), 32 S.C.R. 474, which, I think, was a case of an entirely different character, and not in point in any way.

The question raised for consideration is rather as to the nature of the authority of the officers of a corporation as considered in the case of *Shaw v. Port Philip Gold Mining Co.* and *Colonial Gold Mining Co., Ltd.* (1884), 13 Q.B.D. 103, that of *Mackay v. Commercial Bank of New Brunswick* (1873), L.R. 5 P.C. 394, 410, and that of *Barwick v. English Joint Stock Bank* (1867), L.R. 2 Ex. 259, and analogous cases which I have not had time to refer to. I do not consider these cases exactly in point, and simply mention them as they occur to me as illustrating the principles that I take to guide me in coming to the conclusion I do.

I think, upon the facts before me, that I may infer that the secretary was entitled, as within the scope of his authority, either general or particular, as far as this case is concerned, to answer the questions put to him by the plaintiff in the way he did, and to direct the solicitor to manage his part of the business in the way he did, and that the board of management approved of this method of dealing with the plaintiff. What leads me to that conclusion is that the letter written by Crerar & Crerar, addressed to the manager of the defendant company, seems to have immediately passed into the hands of the secretary, and to have been considered by him along with the documents that accompanied it, and then, of his own motion apparently, transmitted to the solicitor for his opinion; that when the plaintiff called at the defendants' place of business the secretary seems to have been the person, and the only person to whom she could address the enquiries she did address to him; and that the secretary's evidence tends, as I think, to shew that the management of such matters was left largely to him. I think, therefore, that I am warranted in drawing the inference that I do; that when he made the answer to the plaintiff which he did make he was acting within the scope of his authority, or of his apparent authority, in such a manner as to entitle the plaintiff to rely upon his statement in the matter, and that that authority

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was conferred upon him, or is made to appear as if so conferred by the defendants' board of directors, and was therefore binding upon the defendants as between them and the plaintiff.

In saying that the defendants' board had adopted the secretary's action it is but fair to add that he may not have told them what the jury had found as a fact in regard to his misleading the plaintiff.

Judgment will therefore be for the plaintiff for the amount of the policy sued upon, and interest from the 1st of July, 1903, less the premium of \$49.50, the first of July being the date on which, I think from the documents put in, the proofs had been completed. This will be with costs to the plaintiff.

From this judgment the defendants appealed to the Divisional Court.

On January 17th the appeal was argued before BOYD, C., MACMAHON and MEREDITH, JJ.

G. H. Watson, K.C., and James J. Warren for the appellants: The premium was not paid before the death of the insured, nor was there a tender of payment made, and therefore the policy lapsed and ceased to exist. The plaintiff claims that by the terms of the policy 30 days' grace were allowed, and that the defendants by their conduct are estopped from setting up the omission to pay or to make a tender of payment. Under condition 5 the thirty days' grace only applies where the assured is alive within that period and makes the payment. No case can be found holding the policy valid where the insured died within the thirty days, leaving the premium unpaid. Condition 6 expressly provides for the cancellation of the policy when the premium is not paid. The plaintiff cannot invoke the benefit of the statute. The matter was first dealt with by 56 Vict. ch. 32 sec. 10, sub. sec. 12 (8) (O.). Under this it was provided that if the insured died within the thirty days without the premium having been paid, the policy was void. This was amended by 60 Vict. ch. 36, sec. 148 (1) being sec. 148 (1) of the consolidated Act R.S.O. 1897, ch. 203, the Act now in force. This limits the payment to the insured or to a beneficiary under the policy. The plaintiff was not a beneficiary.

She ceased to be such when she assigned the policy to her husband, and as administratrix she has no status. The condition, however, never applied, as it was not proved that the insured was unable to pay. In fact the evidence shews the contrary. The plaintiff has failed to establish any deceit or fraud. Even assuming that there was misrepresentation, there certainly was no misrepresentation in law. To constitute misrepresentation it must be wilful, while nothing of the kind was shewn here: *White v. Sage* (1892), 19 A.R. 135; *Gold Medal Furniture Co. v. Lumbers* (1899), 26 A.R. 78; 30 S.C.R. 55. There was no estoppel. Nothing was said or done which estopped the defendants from setting up the want of such payment. To create an estoppel the statement must be clear, positive and unambiguous, and must be acted on. The statement made by the secretary Jolliffe falls far short of what is required to create an estoppel. The secretary merely said that the policy was all right as far as he knew. This is a qualifying statement and is not sufficient. *Dixon v. Kennaway*, [1900] 1 Ch. 833; *Knights v. Wiffen* (1870), L.R. 5 Q.B. 660; *Stephens v. Venables* (1862), 31 Beav. 124; *Low v. Bouverie* [1891], 3 Ch. 82; *Angus v. Clifford* [1891], 2 Ch. 449, 474; *Le Lievre v. Gould*, [1893] 1 Q.B. 491, 501. The secretary had no authority to bind the company: Cook on Corporations, 5th ed., vol. 2, sec. 726. Condition 10 would preclude the secretary from binding the company except in writing. The questions submitted to the jury were erroneously submitted, and are inappropriate, and, apart from such questions, the learned Judge assumed to decide questions of fact himself. The findings are against evidence and the weight of evidence, and, in any event, there should be a new trial.

W. R. Riddell, K.C., and *J. B. Crerar*, K.C., for the respondents: The effect of the condition as to the thirty days of grace was to keep the policy in force for the thirty days, and the death having occurred during that period, *i.e.*, during the continuance of the policy, the claim under it became a valid claim: *Stuart v. Freeman*, [1903] 1 K.B. 47. Condition 5 applies to the payment of the renewal premium within thirty days if the insured were unable to pay it when it came due. The evidence of the plaintiff clearly establishes that he was

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then unable to pay. Condition 6 only provides for the avoidance of the policy where the premium is not paid under the circumstances set out in condition 5. There was therefore a debt *in presenti* to be paid *in futuro*, i.e., when proofs were filed. It is quite clear that when the death occurred here within the thirty days the view the secretary took was that the premium would be deducted from the amount payable to the insured, as provided by condition 10. The plaintiff was a beneficiary and is entitled to claim the benefit of the statute. She was a beneficiary under the policy and entitled to make payment, apart from whether there was ability or not by the insured to pay the amount. She was beneficiary as next of kin. She also had such an equitable interest as would entitle her to sue. The defendants are clearly estopped from setting up any want of payment. What took place between the plaintiff and the secretary and between the defendants' solicitor and Crerar & Crerar would clearly prevent the defendants from afterwards setting up a want of payment: *Simpson v. Accidental Death Ins. Co.* (1857), 2 C.B.N.S. 257. The secretary was duly authorized to act for the company, and he says that all his acts were recognized and approved of by the company: *Wing v. Harvey*, 5 DeG. M. & G. 365; *English and American Encyclopædia of Law*, 2nd ed., 428, 431. The learned Judge only dealt with such questions of fact as reasonably resulted from the findings of the jury. The findings of the jury are supported by the evidence, and the Court will not interfere with them.

February 17th. BOYD, C.:—The company defend on the following grounds:

1. Fraudulent representation by Tattersall on the application for insurance.
2. Denial that the plaintiff was assured that the policy was all right or misled.
3. Statement that the plaintiff was told that the premium had not been paid.
4. All liability ceased on the death of Tattersall with overdue premium unpaid.
5. On his death it was not possible to renew or to revive the policy by tender because there was no beneficiary who could make tender under the contract.
6. Tattersall having died in default and no tender having been made

by any one within thirty days from the date of the premium liability ceased on the policy.

On these matters of fact the jury have found in favour of the plaintiff's contention, and the evidence is sufficient to support such finding as right and proper.

As a matter of law it was argued that there was no right to tender after the death of the assured, and, if there was such right, there was no beneficiary in this case to make a tender.

The last premium of \$49.50 fell due on the 10th of April, 1903, and was not paid. The death was on the 22nd April, 1903, intestate, and the plaintiff, his wife, is the administratrix.

On the 19th of December, 1902, the wife, in whose favour was the policy, assigned her interest to her husband subject to the terms of an agreement referred to in the assignment. This was not notified to the insurance company till after the death. The policy was assigned to the husband in consideration of his granting her an annuity of \$1,500, on condition that if he predeceased his wife the said policy and the proceeds thereof should be charged with payment of the said annuity. There had been default also in the last payment of the annuity before the husband's death.

She, as administratrix of her husband's estate, is entitled to collect the proceeds of the policy and hold it as trustee charged with the payment of the annuity of \$1,500 for her life. She was also at his death interested as beneficiary or *cestui que trust*, in this policy and its proceeds for the arrears of annuity then outstanding.

The policy was assigned to the husband, his executors, administrators and assigns, but charged with payment of the annuity. It was not absolutely his property, but he took it as assignee of the beneficiary named in the policy, and it would go after his death to his administrator as assignee of the same beneficiary, or in other words, the husband, became the beneficiary by the assignment and his representatives could pay the premium in default. Endorsed on the policy were conditions and provisions of which are important Nos. 5 and 8.

(5). "Thirty days of grace will be allowed for payment of renewal premiums if the insured be unable to pay them when due."

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(8). "From any sum payable under the policy the company may deduct any lien that may be standing against the policy and the balance (if any) of the yearly premium from the then current policy year."

The present statute applicable to this policy provides for thirty days' grace during which the payment in default may be made by the assured, or by any of the beneficiaries under the contract: R.S.O. 1897, ch. 203, sec. 148 (1). The original section passed in 1893 provides that this payment might be made when "the event upon the happening of which the insurance money becomes payable has not yet happened": 56 Vict. ch. 32 sec. 10, sub-sec. 12 (8) (O.). These words in case of a life policy excluding the right so to renew or revive the contract by after-payment when death has happened to the person insured were expunged by the legislature in the amendment made in 1897 (60 Vict. ch. 36, sec. 148 (1))—the section now in the Revised Statutes of 1897. The point of law was discussed before the statute provided for days of grace in *Manufacturers Life Ins. Co. v. Gordon*, 20 A.R. 309, where the policy provided that a grace of one month would be allowed in the payment of the policy. The Court of Appeal was equally divided as to whether the grace-payment could be made after the death of the insured. Next year the Ontario Statute of 1893 was passed which adopted the view that the payment must be before the death. But in 1897 the excision of the clause having this meaning indicates the mind of legislature to be favourable to the views of Burton and Maclellan, JJ.A., who thought that payment might be at any time before the expiry of the period of grace whether the life had dropped or not. This appears to me to be the correct reading of the existing law, and I think that any one interested, whether beneficiary or representative of the assured, may make a valid tender of payment of the premium in default within the thirty days of grace. In this case therefore there was a hand existing by whom the needful payment might be made, if not relieved therefrom by the conduct of the company: *Stuart v. Freeman*, [1903] 1 K.B. 47 and at p. 54 *per Romer*, L.J.

I agree with the conclusions by the trial Judge and jury that the facts disclose a case of estoppel against the company

whereby the conduct and statements as well as the silence (when it was a duty to speak) of the company's agents operated to mislead the plaintiff and lull her into security during the currency of the days of grace. This is on the lines indicated in *Simpson v. Accidental Death Ins. Co.*, 2 C.B.N.S., 257 at pp. 287-8. There may be an explanation of all the conduct and statements found by the jury by holding that the company, after the death and knowing of the intention to pay the premium, decided to waive actual payment and apply part of the proceeds of the policy to defray the premium; but, however it may be put, I think it is a just conclusion to uphold on the merits the finding in favour of the plaintiff.

The appeal is dismissed with costs.

MEREDITH, J.:—It is not contended that the plaintiff is entitled to succeed if there was no tender or payment, or its equivalent, of the premium, within the thirty days. Neither the contract nor the statute would lend much encouragement to such contention. The provision contained in condition 8 for deducting "the balance (if any) of the yearly premium for the then current year" from any sum payable by the company under the policy is a provision, as all provisions in such conditions generally if not invariably are, entirely in the company's interests, and plainly enough, I think, points to money not yet payable when the death occurred; cases of payment of the premium in monthly, half yearly or other instalments, and provision that the company shall be in the same position as if the payment had been in one annual sum, for instance, if the person whose life was in this case insured had died in the first half of any year, the next half year's payment should be deducted from the amount payable under the policy, though but for this condition it would never have become payable. So that the questions for consideration are whether there was a right to pay within the days of grace but after the death, and if such payment were made, or the case is to be treated as if it had been made or tendered.

The important question, whether advantage can be taken, after the death of the person insured, of the days of grace

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allowed by a contract for the renewal of a policy of life insurance, by payment of the premium, is one which cannot be said to be yet finally settled; the trend of decisions seems to be towards a holding that it can, and it is said that the earlier cases, so much relied upon always as deciding that it cannot, were not decisions to that effect, though containing weighty dicta pointing that way. In this case the contract of insurance is not for one year, or half year, merely, with a right of renewal; it is for the life of the person whose life is insured, but on the condition that the semi-annual payments are made on the days named in each year *during the term of his life*, with the provision, contained in the condition numbered 5 endorsed upon the policy, allowing "30 days of grace" under the circumstances mentioned in it; and the policy is made in favour of, or payable to, a beneficiary, if she survive the person whose life is insured, and not to his executors administrators or assigns, unless he should survive her. It is, however, unnecessary to consider this nice question for two reasons: (1) as the plaintiff is entitled to recover under the provisions of the Insurance Act; and (2), as it has not been proved that the "insured" was unable to pay the renewal premium in respect of which default was made, such inability being the condition upon which the 30 days' grace was to be allowed.

It is difficult to perceive how a man who could afford to settle upon his wife \$1,500 a year, whilst they were living together as man and wife, and keep that annuity pretty well paid up, and at the same time live, and support his wife, as if he were a gentleman of leisure and means, can be said to have been unable to pay a half yearly sum of \$49.50 to keep up his life insurance. The plaintiff's answer "No" to the single question, "And did he have any means?" was no doubt meant to be true, and so must have meant no property, for he had an income—whether of right or of bounty is not material—enough to support him and his wife in the manner mentioned. That he might sometimes anticipate, or even be obliged to anticipate, his remittances is far from shewing his inability to pay, it rather proves the contrary, for one who can readily so procure money must be able to pay small debts at least. If being obliged to anticipate income made one unable to pay, many in receipt of

the largest incomes, and many great merchants, would be unable to pay. So long as our bankers or others are willing to advance the money we are able to pay. The plaintiff's answer may have arisen from the fact that in a deed of settlement, made between the husband and wife, she is declared to be the owner of their house in Toronto and all that was in it, with a few trifling exceptions. The onus of proof of the "insured" being unable to pay the premium rested on the plaintiff; not only did she fail to satisfy it, but such evidence as there is upon the subject proves the contrary. There was no reasonable suggestion of inability from any cause other than lack of money.

But, in my opinion, the legislation now contained in section 148 of "The Ontario Insurance Act" gives to "the insured, or any of the beneficiaries under the contract, a right to renew the policy by paying or tendering the premium within the 30 days of grace," whether the event, upon the happening of which the insurance money becomes payable, has, or has not, happened. If the words of that section only could be looked at there would be some difficulty in reaching that conclusion, for they seem to treat the contract as ended, and those who were entitled to pay as "in default" for non-payment on the day fixed for payment, and the payment permitted by the section as renewing it, a renewal of a hazard which many might think hardly possible after the event had happened, to the knowledge of the parties, and the insured's right had become a right of action or had ceased altogether, a sort of wagering upon a certainty; but of course there is nothing to prevent the parties so contracting, or the legislature from so enacting. The question is, has either been done? In the original the section was expressly limited to cases in which the event had not happened: 56 Vict. ch. 32, sec. 10, sub-sec. 12 (O.). This enactment was, however, repealed four years afterwards: 60 Vict. ch. 36 (O.); and then re-enacted omitting that limitation. The purpose of that omission could have been only to make the section applicable whether the payment was made before or after the event, so long as it was within the 30 days of grace. It could not have been to create doubt and difficulty—in the state of the authorities at the time making confusion more confounded. Nor could it have been merely because the section was plain enough

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against the right to pay after the event without them. It is to be regretted that the plainer course of inserting the words "has or has not happened" in the place of the words "has not happened," was not adopted. Having regard to these circumstances, and to the fact that the Act was passed and has been amended from time to time largely for the purpose of aiding the insured and of restricting the insurer's powers to contract themselves out of liability, it is impossible for me to reach the conclusion that the purpose of the amendment was not such as I have stated, and I cannot say that the words of the section are not now wide enough to convey it.

Then, notwithstanding the death of the person whose life was insured, "the assured or any of the beneficiaries" might within the thirty days, "pay or tender to the company at its head office or at its chief agency in Ontario, or to the company's collector or authorized agent the sum in default," with the effect of reviving or renewing the contract, which, in the circumstances of this case, means making the company liable to pay the sum insured, if they have no other good answer to the plaintiff's claim. The meaning which the Act expressly attributes to the words "assured" and "beneficiary"—unless a contrary intention appears—is respectively, the person whose . . . life . . . or insurable interest is insured, and every person entitled to the insurance moneys payable by the insurer under the contract, and the executors, administrators and assigns of any person so entitled. The plaintiff was the "beneficiary" in this contract, but she assigned her right as such to the person whose life was insured, reserving however in effect an interest in the insurance as security, in certain events, for the payment of an annuity by him to her. He then became the assignee of the beneficiary and as such entitled to make payments under the section. It is true that he could not be directly the "beneficiary" of a contract of insurance upon his own life; nor could he, I think, indirectly be by making some one else the "beneficiary" merely for the purpose of becoming a "beneficiary" by means of an assignment to him; but in this case there was nothing of that character; there was a *bonâ fide* assignment for value, the beneficiary retaining or retaking an interest in the contract. The person whose life was insured coming within the

definition of "the assured," could also have paid or tendered the premium, and as the Act permits that to be done after his death it follows that his executors or administrators could pay or tender it. So that expressly, under the meaning attributed to the word "beneficiary," the plaintiff, as administrator of the beneficiary, had a right to make the payment or tender; and necessarily as the proper legal personal representatives of the "assured" she also had that right.

It follows then that if the plaintiff had paid or tendered the premium, in the manner and within the time provided for in the section, she would have had a good cause of action. And if the defendants are estopped from denying such payment or tender the same result must follow. The main difficulty, in my mind, upon the question of estoppel arises from the ambiguous form of the questions submitted to the jury. They have found that the plaintiff relied upon the statement of the defendants' secretary that the policy was all right so far as he knew. "Rely upon" is not very definite and perhaps in a strict literary sense does not go nearly far enough. It is to be regretted that the question did not take some such form as, did she relying upon such statement refrain from tendering the premium within the thirty days? or would she but for such statement have tendered the money within the days of grace? But looking at the evidence and especially at the Judge's charge and the undisputed facts, all of which ought to be looked at in connection with the questions and answers, the jury's answer may be taken to mean that the secretary, knowing that the premium had not been paid and that the days of grace had not expired, kept these facts back from the plaintiff, although as he knew a fair and honest answer to her enquiry demanded that they should be made known, and knowing that if they had been made known to her she would have tendered the money—a tender which would unquestionably have been rejected because not made before the death of the person insured. In one part of his charge the learned Judge said to the jury: "You saw the woman, the plaintiff, is she not a woman of education sufficient to understand what she was

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about? Do you think that if she were told that the policy was not all right, that the last premium was unpaid, she would have let the matter rest there? Now that is the issue. She went away apparently satisfied." If the plaintiff's story as to what took place between the secretary and her be true, and the jury have believed it, there is abundant evidence upon which to found an estoppel. The secretary, well knowing that the premium had not been paid and that the days of grace had not expired, and having before him the letter of the solicitors pointedly asking whether it had been paid, and stating that if it had not they would see to the payment of it, instead of telling the truth said, that so far as he knew the policy was all right, a mis-statement or concealment of fact—not a mere expression of opinion—intended to be acted on by the plaintiff, and acted upon by her in the faith of its being disingenuous and true. No one can doubt that if the truth had been told the premium would have been paid or tendered within the 30 days. The purpose of the plaintiff's journey to the defendants' head office and the object of her enquiry were obvious; whether the secretary was bound to tell anything or not, he was bound, if he chose to tell anything, to tell the truth, not to mislead her—to lull her into a sense of security, to her loss.

If, therefore, the defendants are bound by the act of their secretary the plaintiff should be treated as if payment or tender had been made. That they are so bound I have no doubt. What took place took place at the defendants' head office, for the purpose and in the manner before stated; an officer ranking among the highest of the company's officers, and one who, in common with the president and manager, has implied power, under condition 10 of the policy, to "change, waive or alter" in writing its conditions, and apparently the officer to whom policyholders should go as well as write for information, made the misleading statement. Under the 148th section of the Act, had a tender been made to and rejected by even the company's collector or authorized agent, it would have been as effectual as payment; surely then the act of the secretary, in its head office, towards a person there seeking to do

business with the company, in misleading the plaintiff so that no such tender was made, binds them.

I would dismiss the motion.

MACMAHON, J., concurred with BOYD, C.

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[DIVISIONAL COURT.]

A. E. AMES & Co. v. SUTHERLAND.

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Broker—Carrying Stock on Margin—Advances by Brokers—Pledge of Stock—Sale Without Notice—Laches—Measure of Damages.

Feb. 20.

The plaintiffs bought stock as the defendant's brokers, and advanced monies on it, holding it in pledge. They sold the stock at a loss, without notice to the defendant, and on June 19th, 1903, notified him that they had done so, and of the state of his account, but no objection to the sale was taken by him until the present action was brought in December, 1903:—

Held, that the sale, though wrongful, did not disentitle the plaintiffs to sue for the balance due them on account of advances.

The contract of the plaintiffs with the defendant was one which did not oblige them to carry the stock to a particular day; nor the defendant to pay for it at a particular day; but did not permit the plaintiffs to sell without notice.

Held, however, that inasmuch as it appeared that even if the stock had not been sold, the defendant would have continued to hold it up to the time of trial, and as its market value at the trial was less than it had been sold for, the plaintiff's sale had been a benefit to the defendant, and, therefore, he was not entitled to recover damages.

Seemle, per STREET, J., that the proper measure of damages in such a case is the price of the stock at the day of the wrongful sale or the price at the day of trial, at the option of the owner of the stock.

Held, also, per STREET, J., that considering the fluctuating nature of the stock, in question, the defendant had delayed an unreasonable time in objecting, and must be treated as having adopted and ratified the sale; but that as pledgees the plaintiffs were not entitled to sell the shares without notice, and the defendant would have been entitled to damages had it not been for his non-objection.

THIS was an action tried before STREET, J., at the Toronto non-jury sittings on February 8th, 1905.

The facts were as follows:—The plaintiffs were a firm of brokers carrying on business in Toronto. The defendant was a contractor residing at Winnipeg, but being frequently at

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Toronto and other parts of the country on business. On March 3rd, 1902, he employed the plaintiffs to buy for him 400 shares of Dominion Coal Co. stock upon a margin of \$20 per share and he paid them \$8,000 for this margin. The plaintiffs thereupon purchased and paid for the stock, rendering accounts to the defendant from time to time in which he was charged with the cost of the stock, less the amount paid by him, and with interest upon the balance. The stock was purchased at $90\frac{1}{4}$ and a commission of $\frac{1}{4}$ was added, making the total cost of the stock to the plaintiffs..... \$36,200
of which he paid..... 8,000

leaving balance due on it..... \$28,200

The bought note delivered by the plaintiffs to the defendant at the time of the purchase contained the following stipulation: "When carrying stocks for clients we reserve the right of pledging the same or raising money upon them in any way convenient to us."

In January, 1903, the price of the stock having advanced to 130 or thereabouts, the plaintiffs repaid to the defendant the \$8,000 margin and advanced to him an additional \$4,000 upon the stock. During the months of March, April and May, 1903, the market price of the stock decreased rapidly with occasional advances. On May 27th, 1903, the plaintiffs sold 125 of the defendant's shares at 95, charging him $\frac{1}{4}$ per cent. commission, the sale producing\$11,843 75

On May 29th, 1903, they sold 25
shares at 94 net after deducting
commission 2,350 00

On June 3rd they sold 150 shares at
 $76\frac{3}{4}$ net 11,512 50

\$25,706 25

And on the same day, June 3rd, 1903,
they sold the remaining 100 shares
at $74\frac{3}{4}$ net.....\$ 7,475 00
The 400 shares producing..... 33,181 25
or an average of 82.95 net per share:

Those sums were credited to the defendant in the plaintiffs' books, leaving a balance at his debit after crediting dividends and charging interest of \$6,425.91 on June 15th, 1903. A statement shewing the sales and the condition of the defendant's account with the plaintiffs upon the footing of these sales was sent by them to the defendant about June 15th, 1903, and was received by him in due course at Winnipeg within two or three days thereafter. He appears to have been aware of the fact that the sale had been made, however, shortly after June 9th, 1903. On August 8th, 1903, the plaintiffs again wrote the defendant enclosing a statement of their account in detail and asking for immediate payment of the balance. No notice having been taken of either of their communications they placed the matter in the hands of their solicitors, who on September 23rd, 1903, wrote the defendant claiming the balance with interest. No answer having been returned they again wrote the defendant on October 6th, 1903, that an action would be begun unless a reply were received by return mail. Finally on October 12th, 1903, the defendant wrote them that he had referred the matter to his solicitor in Toronto. On December 7th, 1903, no settlement or offer to pay or settle having been made, the present action was brought to recover the balance due upon the footing of the detailed account rendered, in which the defendant was charged with the advances and interest and credited with the dividends and proceeds of the sales. The defendant set up in his defence that the plaintiffs bought the stock as his brokers and held the same as a pledge or security for the amounts advanced with interest at 6 per cent., that they had sold without notice to him and in violation of his rights, and that having done so they were not entitled to call upon him for payment of any balance. It was admitted by the plaintiffs that the sales made by them were without notice to the defendant and that they were not entitled to sell without notice, but they contended that the defendant should have repudiated them when he was informed of them, and was not justified in remaining silent and take his chances of a rise or fall in the price of stock of this speculative character. It was also admitted that the plaintiffs had closed their doors on June 2nd, 1903, although they had continued the business for

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the purpose of liquidation: and it was sworn that they were in a position to have delivered to the defendant his stock at any time down to the time they sold it.

The prices of Dominion Coal Co. stock upon the Toronto Stock Exchange upon the dates which seem material to this question were proved to be as follows:—

May 27th, 1903, 94 to 95½.

May 29th, 1903, 91½ to 93½.

June 2nd, 1903, 78 to 84.

June 3rd, 1903, 82 to 83.

The lowest price reached in the month of June, 1903, was 75 on June 10th: the highest price reached during the month was 97½, which was after June 15th.

In July, 1903, the highest price was 108 and the lowest 88½.

In August the highest price was 89¼ and the lowest 79¾.

In September the highest price was 85 and the lowest 68¾.

In October the highest price was 73½ and the lowest 60.

In November the highest price was 75½ and the lowest 70¾.

In December the highest price was 78 and the lowest 72¾.

At the time of the trial the price was admitted to be under 70.

D. E. Thomson, K. C., and *W. N. Tilley*, for the plaintiffs, contended that the defendant had by his silence adopted the plaintiffs' acts, citing *Dos Passos on Stockbrokers*, pp. 200-2; *Gruman v. Smith* (1880), 81 N.Y. 25; *Colket v. Ellis* (1875), 10 Phila. 375; *Minshall v. Arthur* (1874), 2 Hun (N.Y.) 662; *Stewart v. Drake* (1871), 46 N.Y. 449; *Jones on Pledges*, 2nd ed., pp. 744, 788; and as to the measure of damages: *Markham v. Jaudon* (1869), 41 N.Y. 235; *Baker v. Drake* (1873), 53 N.Y. 211; *Elgin Loan & Savings Co. v. The National Trusts Co.* (1903), 7 O.L.R. 1, 20; *Dos Passos*, *ib.* p. 789.

S. C. Biggs, K. C., for the defendant, cited as to damages: *Carnegie v. Federal Bank of Canada* (1884), 5 O.R. 418; and as to notice of sale being requisite: *Pigot v. Cubley* (1864), 15 C.B.N.S. 701; *De Lisle v. Priestman* (1810), 1 Browne (Pa.) 176; *Mara v. Cox* (1884), 6 O.R. 359; *Markham v. Jaudon* (1869), 41 N.Y. 235; *Gillett v. Whiting* (1890), 120 N.Y. 402; *In re Thuresson*, *McKenzie v. Thuresson* (1902), 3 O.L.R. 271

Cook on Stock and Stockholders, 3rd ed., secs. 458-9. He referred also to *Robinson v. Norris* (1874), 51 How. Pr. 442; *Lawrence v. Maxwell* (1873), 53 N.Y. 19; *Baker v. Drake* (1876), 66 N.Y. 518.

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February 20. STREET, J. [after setting out the facts as above]:—The precise character in which the plaintiffs held the 400 shares of stock was that of pledgees to secure the amount of their advance to the defendant: holding that character they were not entitled to sell the shares without notice, and the sales they made were therefore a breach of their contract with the defendant. This is admitted by the plaintiffs and the question before me is reduced to an enquiry as to the effect of the sale upon the rights of the parties. The defendant contends upon the authority of the reasoning in the American cases of *Knickerbocker v. Gould* (1889), 115 N.Y. 534, 538, and *Gillett v. Whiting*, 120 N.Y. 402, that an unauthorized sale of the pledge by the pledgee put an end to the pledgee's special property in it, and entitled the pledgor at once, and without payment or tender of the advance, to recover the pledge or its full value without deduction from the pledgee. The New York cases are not uniform upon the question and a contrary view was taken in *Baker v. Drake*, 53 N.Y. 211 and in *Gruman v. Smith*, 81 N.Y. 25. The settled rule in England moreover is directly opposed to the defendant's contention. The leading case of *Donald v. Suckling* (1866), L.R. 1 Q.B. 585, determined that a pledgee did not, by an unauthorized dealing with the pledge, put an end to the contract of pledge and to the pledgee's interest in it. This case was followed in *Halliday v. Holgate* (1868), L.R. 3 Ex. 299, and by the Court of Appeal in *Yungmann v. Briesemann*, 67 L.T. 642, decided in 1893. The defendant had rights which he might have enforced upon becoming aware of the fact that the plaintiffs had sold his stock: he might have tendered the plaintiffs the amount due upon their advance and demanded the shares, and if the plaintiffs did not deliver them he might bring an action for their value, deducting the amount due the plaintiffs. Or he might have brought an action against the plaintiffs for the breach of the contract of pledge for the loss he had really sustained by their wrongful act.

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Johnson v. Stear (1863), 15 C.B.N.S. 330; *Yungmann v. Briesemann*, 67 L.T. 642; *Ashburner on Mortgages*, 1897, p. 192.

The defendant took neither of these courses during the six months which elapsed from the time he became aware of the sale until he was sued for the balance of their advances by the plaintiffs. He has however set up the fact of the unauthorized sale in his defence, and his pleading should be treated as a claim to reduce the plaintiffs' debt by the damages which he has sustained by their action: *Lacey v. Hill* (1873), L.R. 8 Ch. 921, 926; *Duncan v. Hill* (1873), L.R. 8 Ex. 242; *Ellis v. Pond* (1897), 78 L.T. 125.

The next question is as to the measure of damages. The case before me is one upon which much authority is to be found precisely in point in the American Courts, and nothing precisely in point so far as I have been able to discover in England. The reason is to a certain extent, perhaps, that the English practice of periodical settling days for stock exchange transactions has no counterpart upon this side of the Atlantic: these stocks are carried as a rule by brokers from one settling day to another instead of as here for indefinite periods. The contract of the plaintiffs with the defendant in the present case was one which did not oblige them to carry the stock to a particular date, nor did it oblige the defendant to pay for it at a particular date: but it did not permit the plaintiffs to sell without giving notice to the defendant. They sold without giving notice and informed the defendant that they had done so, and the defendant made no protest or demand upon them for the stock or request that they should replace it. His first objection seems to have been taken when he set up in his statement of claim that the plaintiffs had acted wrongfully in selling his stock without notice. The rule known as the New York rule which was adopted as the correct one by the United States Supreme Court in *Galigher v. Jones* (1888), 129 U.S. 193, 200, is that the proper measure of damages is "the highest intermediate value of the stock between the time of its conversion and a reasonable time after the owner has received notice of it to enable him to replace the stock."

See *Baker v. Drake*, 53 N.Y. 211; *Wright v. Bank of the*

Metropolis (1888), 110 N.Y. 237, where the reasoning upon which this rule is adopted appears.

No such rule has been adopted in England and I think its adoption would be inconsistent with the reasoning upon which the Court proceeded in *Williams v. Peel River Land & Mineral Co., Ltd.* (1886), 55 L.T. (N.S.) 689, and which was adopted in *Little v. London Joint Stock Bank*, [1891] 1 Ch. 283, by the Court of Appeal. The Court then refused to adopt a rule in fixing damages for a wrongful refusal to deliver bonds of fluctuating value which assumed that the owner had he obtained the bonds would have sold them at the highest price between two dates. To the same effect is *Mansell v. British Linen Co. Bank*, [1892] 3 Ch. 159, 163, in which the position of the person claiming damages upon that basis is illustrated by the fable of the man who had to go through a pathway in a field of corn, not being able to turn back, and his duty being to cut down the highest blade of corn he passed on his journey. He passed several high blades, but did not cut them hoping to reach a higher blade later on and he came to the end of his path and he cut no blade at all.

The assumption which the Court was asked to make without any evidence to support it, is that the owner had he obtained his stock would have sold it at the highest price between two distant dates was treated as too uncertain.

In *McArthur v. Lord Seaforth* (1810), 2 Taunt. 257, the defendant had borrowed stock from the plaintiff, giving a bond to replace it on a particular day: he failed to replace it at the day fixed and it was held that the measure of damages was not the profit which the plaintiff might have made had it been sooner replaced (it not being shewn that he would have made it), but that the measure of damages is the price at which it ought to have been replaced according to the bond, or the price at the day of trial at the option of the plaintiff. In *Owen v. Routh* (1854), 14 C.B. 327, which was an action of the same character, it was conceded by the defendant's counsel that upon the authorities he could not dispute that the damages must be estimated at the price at the time it ought to have been replaced, or at the price at the time of trial at the plaintiff's option: and as the stock had been constantly rising since the day at which it

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ought to have been replaced, the price at the time of trial was adopted by the Court. *Forrest v. Elwes* (1799), 4 Ves. 492, cannot be treated as affording a precedent or laying down a principle upon which the present case can be determined. Forrest in 1766 applied to Elwes to lend him £8,000 annuities then worth £7,170, giving a bond to replace them in six months and in the meantime to pay interest at 5 per cent. on the £7,170, which was recited as being the produce of the annuities. The annuities were never replaced and Forrest's estate was being administered in the Master's office in the year 1795 when Elwes' claim was made there. The Court ordered that the matter should be treated as a loan of £7,170 by Elwes to Forrest, the securities in question having fallen in value in the 29 years which had elapsed since the original transaction. This case neither took the date when the stock should have been replaced nor the date of the trial, but the date of the original loan, and must, I think, be treated as based on the exceptional circumstances which enabled the Court to treat it as a simple advance of so much money which was to have been but had not been repaid in a stipulated manner.

Damages are not assessed as a penalty upon a person who has improperly dealt with the property of another, but only for the purpose of making good the loss which that other has sustained by the improper action taken, and if in the result the evidence shews that he has sustained no loss he is not entitled to recover damages. In the present case the defendant when giving his evidence stated that at the time when the plaintiffs sold this 400 shares of Dominion Coal Co. stock without notice to him he held 2,500 shares of stock of that company in the hands of other brokers in England which he still held at the time of the trial, and he said that if the plaintiffs had not sold the 400 shares he would still have held them. That this evidence is very material upon the question of damages is, I think, plain. It is a statement by the person claiming the damages that if the plaintiffs had not put it out of his power to retain the stock by selling it he would not have sold it, but would have kept it down to the time of the trial as he had kept his other 2,500 shares.

In *Williams v. Peel River Land & Mineral Co. Ltd.*, 55 L.T. 689, at p. 692, Bowen, L.J., regrets that evidence had not been given as to whether or not the persons claiming damages would have sold the stock there in question had they been allowed to: and he suggests that such evidence would have enabled the Court to make less of a guess at the compensation to be given. If we take the statement of the defendant in the present case as to what his course would have been with regard to this stock, and I see no reason for not doing so, it seems to me he has concluded himself upon the question of damages, for the admission made was that the stock at the time of the trial could have been bought very much below the price at which the plaintiffs sold it. And it is not a case in which the defendant can say that the plaintiffs had his money and that therefore he could not buy stock to replace what they had sold, for the evidence shews that they had not only repaid to him the \$8,000 deposited as margin, but that they had actually advanced him a further sum of \$4,000 upon the stock. In my opinion, therefore, the defendant has failed to shew that he is entitled to recover damages from the plaintiffs, because he has shewn that their action has in the event been a benefit to him instead of an injury.

I am of opinion also that the defendant by his unreasonable delay in objecting to the sale disintitiled himself to recover and must be treated as having adopted and ratified it. As I have pointed out the sales were notified to the defendant by the plaintiffs not later than June 19th, and no objection was made until after the present action was brought in the following December. Considering the fluctuating nature of the stock in question this was an unreasonable time. The plaintiffs were entitled to an early objection from the defendant to the course they had taken so that they might have an opportunity of buying back the stock so as to protect themselves: and the defendant was not entitled to lie dormant and object or approve according as the fluctuations of the market might suit him best: *Hayward v. National Bank* (1877), 96 U.S. 611; *Colket v. Ellis*, 10 Phila. (Pa.) 375.

The plaintiffs are therefore entitled to judgment for the amount of their advances with interest on them at the rates

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shewn in the accounts rendered, deducting the dividends received and the proceeds of the sales of stock, and the defendant must pay the costs.

The defendant appealed to the Divisional Court, and the appeal was argued on April 17th, 1905, before MEREDITH, C.J.C.P., FALCONBRIDGE, C.J.K.B., and ANGLIN, J.

S. C. Biggs, K.C., for the defendant, contended that before a pledgee could recover he must come in and prove certain things, amongst others that he has the stock and is ready to deliver; that here the pledgees had broken their contract, and could not deliver the stock on payment of the money; that the cases relied on by the plaintiffs were nearly all cases where the pledgor brought the action to recover damages for conversion of the stock, not cases of the pledgee suing as here: *Gillett v. Whiting*, 120 N.Y. 402; that the defendant was entitled to reasonable notice, but got none: *Cook on Stock and Stockholders*, 3rd ed., sec. 458; that the sale here was unlawful, but having sold, the plaintiffs had no business to divide, and did so at their own risk; that the proper measure of damages was the highest value the stock reached within a reasonable time of the sale; *Carnegie v. Federal Bank of Canada*, 5 O.R. 418, 425-6; *Michael v. Hart & Co.*, [1901] 2 K.B. 867, at p. 869, [1902] 1 K.B. 482; *Galigher v. Jones*, 129 U.S. 193; that one or two months' notice would not be unreasonable. He also referred to *Ellis v. Pond*, 78 L.T. 125, at p. 135; *Duncan v. Hill*, L.R. 8 Ex. 242; *McKenzie v. Thuresson*, 3 O.L.R. 271, at p. 274; *Donald v. Suckling*, L.R. 1 Q.B. 585, at p. 618.

D. E. Thomson, K.C., and *W. N. Tilley*, for the plaintiffs, contended that the defendant had acquiesced in the sale; that he was bound to object within a reasonable time of receiving notice: *Knickerbocker v. Gould*, 115 N.Y. 534; *Dos Passos on Stockbrokers*, p. 103; *Jones on Pledges*, 2nd ed., p. 786 *et seq.*: that no stock was ear-marked for the defendant; that, as to damages, at the time of the sale, the defendant owed them the par value of the stock, and it never went up afterwards to the par value. They relied on *Baker v. Drake*, 53 N.Y. 211.

Biggs, in reply.

May 23rd. The judgment of the Court was delivered by MEREDITH, C.J.:—This is an appeal by the defendant from the judgment in favour of the respondents directed to be entered by Street, J., on February 20th, 1905, after the trial of the action before him sitting without a jury on the 8th of that month.

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The reasons for the judgment of my brother Street contain a statement of the facts and it is unnecessary to repeat them.

The main ground taken in support of the appeal was that the respondents having without authority sold the stock of the appellant which was pledged to them for the advances made to him, and being therefore, as it was argued, not in a position to return the stock pledged to the appellant on payment of the advances, the respondents were not entitled to recover what remains due to them on account of the advances.

We are of opinion that this contention is not well founded.

The cases referred to by my brother Street, *Lacey v. Hill*, L.R. 8 Ch. 921, at pp. 924-56, and *Ellis v. Pond*, [1898] 1 Q.B. 426, at page 438, 78 L.T.N.S. 125, are conclusive against the appellant's contention.

Even if the decisions of the New York courts were to govern, the result would be the same, for in *Minor v. Beveridge* (1894), 141 N.Y. 395, the law was thus declared by Haight, J., in delivering the judgment of the Court, at p. 403: "Under the settled law of this Court . . . even where a broker sells, without due notice, stock purchased by him for a customer on a margin and held in pledge to secure the advance made by him for the purchase, he does not thereby extinguish all claim against the customer for the advance, but the customer is entitled to be allowed as damages . . ."

There remains to be considered the question whether my brother Street was right in holding that the appellant was not entitled to recover any damages for the wrongful sale of the stock by the respondents.

While I do not find in the testimony of the appellant given at the trial any express statement that if the stock had not been sold by the respondents he would still have held it, I

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think the proper conclusion upon the evidence is that he would have done so, and I agree therefore in the opinion of my brother Street that as the stock at the time of the trial could have been bought very much below the prices at which it was sold by the respondents, the appellant suffered no damage from the sale having been made by the respondents.

The appeal should in my opinion be dismissed with costs.

A. H. F. L.

[DIVISIONAL COURT.]

HILL V. TAYLOR ET AL.

Municipal Corporations—Negligence of—Erection of Building—Appointment of Architect—Liability.

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A building was being erected by a city under the plans and specifications of an architect, the various works being let out to different contractors. While the plaintiff, a workman employed by the contractors for the carpentering work, was rightfully working within the building, it collapsed by reason of insufficient truss rods placed therein through the architect's negligence; there being nothing, however, to shew any negligence or want of care on the part of the city in employing the architect:—
Held, that no liability was imposed on the city.

THIS was an action tried before BRITTON, J., without a jury, at Ottawa, on September 22, 1904.

Wyld, K.C., and Glyn Osler, for the plaintiff.

G. V. Henderson, for the defendant Taylor.

T. McVeity, for defendant the city of Ottawa.

October 29, 1904. BRITTON, J.:—The plaintiff was seriously injured in the collapse of a large building which was being erected by the city of Ottawa for the purpose of an annual fat stock exhibition.

The city employed one M. C. Edy, an architect, to prepare the plans and specifications, and then let the work to different contractors for the erection of the building in accordance with such plans and specifications.

The defendants Taylor & Lackey were the contractors for the carpenter work, including putting on the roof and putting in the supports necessary to sustain it.

The plaintiff was a workman employed by Taylor & Lackey, and at the time of the collapse was rightfully at his work inside the building.

At the trial questions were submitted to the jury.

The jury found that the falling of the roof was occasioned by the breaking of the truss rods, and that the architect, M. C. Edy, was guilty of negligence in providing for truss rods of insufficient strength.

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The jury completely exonerated the defendants Taylor & Lackey from any negligence and from any knowledge that the building was unsafe.

The jury assessed the damages at \$2,500 against the city of Ottawa in case the plaintiff is entitled to recover from that city.

Is the plaintiff, upon the undisputed facts, and upon the finding by the jury of negligence on the part of the city architect, Edy, entitled to recover?

At the trial I reserved my decision upon the motion of the city for a nonsuit, and also upon the city's motion for judgment.

The case is one of considerable importance. There was no evidence of knowledge on the part of the city of incompetence of the architect; indeed, apart from this particular work there was no evidence that Mr. Edy was in fact in any way incompetent. He was an architect of good standing, of considerable experience, and had for a long time carried on his business or profession at Ottawa, having been employed in the construction of many buildings.

There was no evidence of any negligence or want of care in employing him. Edy was, as found, in fact negligent, or had not the requisite professional knowledge to enable him to properly specify for so large a building, and with such a roof.

It must be assumed for the purpose of this case that the city was the owner of the land, and that the building was being lawfully erected thereon by them for the use of the public. This work was not necessarily dangerous. It was not in the nature of a nuisance—not, in the natural order of things, likely to injury any one. The architect was employed to do his part of his work in his own way and according to his supposed skill and knowledge. If he had properly done his work no damage would have resulted.

If it had been part of the instructions of the city to the architect that the roof was to be of a certain span or size, and was to be supported by rods of a particular size, or if the city in any way interfered with the work of the architect, there might be liability, but here, putting in the rods found to be defective was not the necessary consequence of what the architect was employed to do. He was to determine the size

and strength of the iron to be used, and he was an independent contractor as to that.

It was argued by counsel for the plaintiff that the city, in erecting the building, owed a duty to the public that the building should be safe, and that duty could not be delegated, and in support of the proposition the case of *Jolliffe v. Woodhouse*, (1894), 10 Times L.R. 553, was cited.

In that case it was the duty of the defendant to rebuild a well, within reasonable despatch, and it was held that the delay could not be excused because of the negligence of the architect or contractor.

The case cited was distinguished from the class of cases where employers, not negligent in employing men, were excused, although there was negligence in doing the work.

In Hudson's Building Contracts, 2nd ed., vol. 1, p. 71, the text states plainly that if the acts done are within the scope of the architect's authority, the employer is liable as well as the architect. This, as will be seen by reference to the cases cited by the author, requires some qualification.

In *Walker v. McMillan* (1881), 6 S.C.R. 241, liability attached, on the ground that the work was illegal. All were held liable.

What was the duty of the city to the public in the erection of the building in question?

It was not that they should by their permanent officers, whose duties are prescribed by statute, do the work. No member of the city council need have any skill in or knowledge of building. It is not like the ordinary day-by-day work, and it is not work that any committee of the council is required to be familiar with, or should undertake. The duty of the city was to let the work in its different branches to persons supposed to be skilled therein.

What did the city undertake to do in erecting this building? It undertook to erect it, not by giving directions to any general officer or servant of the corporation or to a committee of the council, but to a skilled person. I think the city performed its duty and answered its undertaking to the public in being careful to employ an architect believed to be competent, and in letting the work to independent contractors. Mr. Eddy belonged

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to an independent profession, and was employed because of that, to do something for which the city, with good reason, thought him qualified, and for which the members of the council and officers of the corporation were not qualified. The architect was employed "to produce a given result," but in the actual execution of that work he was not under the direction or control of the city.

The late case of *Hall v. Lees* in the Court of Appeal, [1904] 2 K.B. 602, is a most interesting one, and has a bearing upon the point now under consideration. See also *McCann v. Corporation of Toronto* (1897), 28 O.R. 650, and cases cited by Mr. Labatt in his article on Liability of Employers in 40 C.L.J., pp. 532, 533.

After a careful consideration of the able argument of counsel at the trial, and a perusal of most of the cases cited, I think the weight of authority is against holding the city liable. I am of opinion that this is not a case for the application of the maxim "*respondeat superior*." I think there was not between Edy and the city, the relation of master and servant such as to make the city liable for the injury to plaintiff which resulted from Edy's negligence.

The case is well entitled to further consideration, but the defendants insist upon and are entitled to my opinion, so I must direct judgment to be entered for all the defendants.

If, upon the evidence and the findings of the jury, the city is liable, the plaintiff will be entitled to recover the \$2,500, as assessed with costs.

I understood that counsel for Taylor & Lackey did not ask for costs, and, for reasons which appear to me sufficient, I think judgment should be without costs as to all the defendants.

Judgment for defendants, dismissing the action without costs.

From this judgment plaintiff appealed to the Divisional Court.

On January 17th, 1905, the appeal was heard before BOYD, C., MACMAHON, and MEREDITH, JJ.

Glyn Osler for the appellants. Generally speaking a person employing an architect to draw the plans for the erection of a building and to superintend its erection, is not responsible for negligence or defects in its work. The employment, however, is in every case a question of contract, and the contract may be of such a character as to render the employer liable. Here, by the terms of the contract, the architect's employment was not independent of the corporation, but the relationship which existed between him and the corporation was that of master and servant, and the city as the master would be responsible for the negligence of its servant: *Hall v. Lees*, [1904] 2 K.B. 602; *Campbell v. Lunsford* (1887), 83 Ala. 512; Pollock on Contracts, 7th ed., 119; *Holliday v. International Telephone Co.*, [1899] 2 Q.B. 392. The next point is that the building was being erected by the corporation in a public place, and therefore it was their duty to take reasonable precautions against the happening of the accident to those using the street, and they could not relieve themselves from liability by delegating to some one else a duty imposed upon them; *Hardaker v. Idle District Council*, [1896] 1 Q.B., 335, 351; *Penny v. Wimbledon Urban District Council*, [1898] 2 Q.B. 212; [1899] 2 Q.B. 72. In any event there should be a new trial, as the finding is against the evidence and the weight of the evidence.

Taylor McVeity, for the respondents, was not called upon, the Court being of opinion that the judgment had been properly entered for the defendants; and, therefore, dismissed the appeal.

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Criminal Law—Combination in Restraint of Trade—Conspiracy to Prevent or Lessen Competition—Criminal Code, sec. 520, sub-sec. (d); sec. 930—52 Vict. ch. 41, sec. 5 (D.).

Defendant was president and took an active interest in an association, one of the declared objects of which was the protection of its members who were dealers in coal, against the shipment of coal direct to consumers by producers. It was also formed to prevent members, including any local organization who had become members, from buying coal from any producer, who sold direct to consumers or to dealers who refused to maintain prices as fixed. When notified no member was permitted to purchase coal of any producer, etc., who sold direct to a consumer in any place where there was a member of the organization, or who sold to dealers who refused to maintain prices. For violations of these provisions, a claim for 50 cents a ton might be made for coal so irregularly sold, and if allowed and not paid by the defaulting member, after notice, any member dealing with the defaulter was liable to be expelled from the association. All these provisions and others having the same object were embodied in the printed constitution and by-laws of the organization, which were in force up to the time of the trial.

Evidence was given of sales having been refused to dealers, not members of the association, for that reason and that dealers could not become members as of right; that a list of members and non-members was published, the latter of whom were not allowed to purchase except at retail prices, and that the association was in effective and active operation according to its constitution and by-laws. By sec. 520, sub-sec. (d) of the Criminal Code, as amended, every one is guilty of an indictable offence, etc., who conspires, combines, agrees or arranges with any other person . . . To unduly prevent or lessen competition in the production, manufacture, purchase, barter or sale, transportation or supply of any article or commodity which may be a subject of trade or commerce:—

Held, that the defendant was rightly convicted of an offence under the subsection, the plain object of the association being to restrict and confine the sale of coal by retail to its own members, and to prevent anyone else from obtaining it for that purpose from the operators and shippers.

Held, also that, the offence being a continuing one, sec. 930 of the Code (if applicable to indictable offences) which limits the time for laying any information to within two years after the offence is committed did not apply.

Held, finally that a cross appeal by the Crown did not lie as sec. 5 of 52 Vict. ch. 41 (D.), only gives an appeal from a conviction.

THIS was an appeal from the judgment of Meredith, J., at the trial.

The defendant was indicted and charged with offences under sub-sections (b), (c) and (d) of section 520 of the Criminal Code, 63 & 64 Vict., ch. 46 (D.), and having elected to be tried without a jury, was tried at the Assizes in Brantford, on the 15th and 16th of April, 1903, before Meredith, J.

Clute, K.C., and *Wilkes*, K.C., for the Crown.

Brewster, K.C., for the defendant.

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It appeared that the defendant was president of and took an active interest in the conduct of the affairs of "The Ontario Coal Association"; that that association had a formal constitution and by-laws, which declared that the object of the association was to protect its members against the shipment of coal direct to consumers by producers, miners, etc.: that any shareholder who had certain business facilities and was regularly engaged in the sale of coal was eligible for membership; that any organization of coal dealers was eligible for membership; that wholesale shippers might become honorary members; that charges, complaints and grievances were to be settled, in case amicable adjustment failed, by the executive board; that on notification, no member should buy coal of any producer, etc., who sold direct to any consumer in any town where there was a member, or to dealers who refused to maintain the prices fixed by the local organization; that any producer who did so, lost his standing in the association; that any member, doing business in the town where such sale was made, might claim fifty cents a ton on such sale; and if not paid by the offender, members were to be notified that he was not in good standing, and any member dealing with him after such notification might be expelled from the association; lists of members in good standing were to be published; operators and shippers not in good standing were to be so reported.

A list of members was published and distributed, as well as a "look-out list" addressed "To our wholesale friends," of persons who were not regular dealers, according to the rules of the association, and sales to whom would cause injury and might result in trouble to the shipper.

There was evidence that coal dealers and shippers in Buffalo had refused to sell coal wholesale to persons in Ontario because they were not members of the association, and that dealers in Ontario could not become members of the association, as of right, because the state of the coal business would not admit of additional competition; and that persons on the "look-out" list could not purchase, except at retail or net ton prices, from

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members of the association, and that the association was in effective and active operation

It was contended on behalf of the defendant that the meaning of "conspire," in section 520 of the Code, was limited by the definition of "conspiracy," in section 516, and that it was not proved that the defendant had been guilty of any "unlawful" act; and that as the association had been formed in the year 1902, section 930 applied and the prosecution had not been commenced in time.

At the conclusion of the trial, the learned Judge found the defendant guilty of the offence charged under sub-section (*d*) of section 520; but not guilty upon the other counts under sub-sections (*b*) and (*c*); and that section 930 did not apply, and directed that the defendant should enter into a recognizance for \$4,000 to appear and receive sentence when called upon.

The judgment pronounced at the trial was as follows:—

MEREDITH, J.:—"Every one is guilty of an indictable offence, and liable to a penalty not exceeding four thousand dollars, and not less than two hundred dollars, or to two years' imprisonment, or, if a corporation, is liable to a penalty not exceeding ten thousand dollars, and not less than one thousand dollars, who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company

"(*a*) To unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; or

(*b*) To restrain or injure trade or commerce in relation to any such article or commodity; or

(*c*) To unduly prevent, limit or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or

(*d*) To unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property." 63-64 Vict. ch. 46, sec. 520 (D.).

The accused is charged with three offences under this section of the Criminal Code, namely, a conspiracy to prevent or lessen competition, under sub-sec. (d); a conspiracy to restrain and injure trade or commerce, under sub-sec. (b); and a conspiracy to unreasonably enhance prices under sub-sec. (c).

There was, in fact, but one agreement or combination—though it may have been renewed from time to time—and if but one agreement, there can be but the one crime, even though that agreement comprehended the doing all of those things made unlawful by this section. The crime is in the conspiracy, not in the unlawful acts comprehended in it. If A and B agree unreasonably to enhance prices, and unduly prevent competition, contrary to the form of this statute, that is but one offence of conspiracy; but if they agree separately as to the one thing and as to the other, as, for instance, at one time as to one and at another time as to the other, there are two offences. By looking at the acts agreed to be done, instead of only at the agreement to do them, the crime is apt to be wrongly multiplied. A conspiracy to rob a man, to burn his dwelling-house, and to kill him, is but one crime, if all be included in the one agreement; if the deeds are done, or attempted, there are three crimes, but crimes of a different character, and additional to the crime of conspiracy: see *The State v. Sterling* (1872), 34 Iowa 443, and *The Queen v. Button* (1848), 11 Q.B. 929.

In this case there was but the one agreement; the one conspiracy. There was no separate agreement as to any of the several restraints of trade complained of; there can, therefore, be but the one crime, if any; but if there is proof of a conspiracy to do any one of the prohibited acts set out in the indictment, that is, of course, enough to require a conviction.

If found guilty, the conviction should, therefore, be for one offence only: it ought not to be made to appear as if the accused were guilty of three crimes instead of only one crime.

The Queen v. Gompertz (1846), 9 Q.B. 824, does not really conflict with this view of the crime, and the manner in which it should be dealt with. It could never have been meant, by the judgment in that case, that the accused should be punished as if guilty of more than one offence; and, if so, it would be better that the indictment should be confined to one count, and

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certainly, however effected, that the accused should be convicted and punished for one crime only: see *O'Connell v. Her Majesty The Queen* (1844), 11 Cl. & F. 155, and *The King v. Hollingberry* (1825), 4 B. & C. 329.

The guilt of the accused—guilt of one crime of conspiracy—depends upon whether it has been proved that he did agree with others for the doing of any one of the things charged in the indictment.

It is proved—indeed, it is not denied—that he agreed with others to lessen and to prevent competition in the sale of anthracite coal: the one question is, was the purpose of that agreement to lessen or prevent such competition unduly?

The accused and the others formed an association the purpose of which was plainly to obtain for themselves the whole control of the purchase, for the purpose of sale in this Province, and the sale of it in the Province, of all such coal, for their own profit and advantage. This is evident even from the rules of the association, prepared, doubtless, with considerable care to appear unobjectionable, or as little objectionable as possible, as well as by their president's—the accused's—conduct of its affairs. Not only does he seem to have believed in the association's purpose and power to monopolize trade, but also to have exercised such powers in a fittingly imperious manner: see *Harding v. The American Glucose Co.* (1899), 182 Ill. 551.

Such coal has become practically one of the necessities of life in this Province, as well as in some other countries. Can it be said that a monopoly of the whole supply, by the accused and the other dealers in the commodity associated with him, with the consequent power it would give them, whether exercised to the full for their own gain or not, is not an undue prevention or lessening of competition in the supply of the commodity? My answer to the question must be that it is a dangerous power, unfair, unreasonable and unjust towards mankind at large in the Province; towards those who might desire to trade in the commodity without joining the association and becoming a party to the wrong, and towards those who are obliged to buy—practically everyone; and, if so, it must assuredly be an undue prevention or lessening within the meaning of the statute.

It is not necessary to consider whether the mere combining of businesses, resulting in a prevention or lessening of competition, without any intimidation of anyone, or direct restraint upon output or import, would be any violation of the statute. Each case must depend upon the purposes, and the nature, and the intended effect, of the particular conspiracy, combination, agreement or arrangement, entered into. In this case there was intimidation of a character likely to be quite as effectual as, if not more so than, even a threat of physical force, and there was a direct and potent restraint upon the import of this necessary commodity—which is had only by importation—at a very critical period.

Nor is it necessary to consider what the common law is, or what is the effect of any of the statute laws of England in force in this Province, or how either has been affected by legislation here, for the sole charge is of a breach of the enactment in question—sec. 520 of the Criminal Code, as it now is—and upon that charge only has the accused been tried. But it may be called to mind that there has been, for a very long time, Provincial legislation, in a small way, against such acts as those under consideration: see the Municipal Act, R.S.O. 1897 ch. 223, sec. 580, sub-secs. 7 and 8, where the word “monopoly” is used in its ordinary meaning as I also employ it throughout this judgment, not in its strict legal signification: see *The King v. Norris* (1758), 2 Ld. Keny. 300, and *People v. Goslin* (1902), 171 N.Y. 627.

Nor is the case of *Mogul Steamship Co. v. McGregor, Gow & Co.*, [1892] A. C. 25, an authority in the accused’s favour, for in that case the circumstances, as set out by the Lord Chancellor, pp. 36-37, fall short of, and are widely different from, what was done in this case; but, much more, because that case expounds the law of England, where no such enactment as that in question exists, and where even the common law offences of badgering, engrossing, forestalling and regrating, had been utterly abolished by 7 & 8 Vict. ch. 24 (Imp.); whilst this case depends wholly and solely upon recent legislation aimed against undue interference with trade.

Now it is quite plain that Parliament intended by the

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enactment to further control the right to hamper and monopolize trade, though, until the second amendment of the Act, it seems to have failed strangely to effect such purpose, indeed to have produced quite futile enactments until the word "unlawful" was eliminated.

The accused has elected trial without a jury—a right given in the original enactment and still preserved—and I am, therefore, required to exercise the duties of both Judge and jury, subject to appeal; and I find, as a fact, that the accused did conspire with others unduly to lessen competition in the purchase and sale of anthracite coal, a commodity which may be and was and is a subject of trade.

It would be difficult for me to suggest what would be such an undue lessening of such competition, if the domineering and absolute control over the commodity which the association designed and endeavoured to get, and to exercise, be not undue. It was not merely endeavouring to control the market, but to prevent altogether a market for the commodity, to give the members of the association a complete monopoly of it, to take it out of the open market entirely: see *Morris Run Coal Co. v. Barclay Coal Co.* (1871), 68 Pa. St. 173.

But it is contended that the right to prosecute is barred by the lapse of time under sec. 930 of the Criminal Code, the contention being that the members of the association are relieved from all criminal liability because the information was not laid within two years from the formation of the association. Section 930 is in these words: "No action, suit or information shall be brought or laid for any penalty or forfeiture under any such Act except within two years after the cause of action arises or after the offence is committed, unless the time is otherwise limited by such Act."

"Any such Act" is any Act in respect of which any pecuniary penalty or any forfeiture, for violation of it, is provided: see section 929.

It is difficult to see how section 930 can apply to this case, in which the accused, if guilty, can be imprisoned for two years or fined not less than \$200 or more than \$4,000. It is difficult to perceive how the information, not seeking to recover any penalty or forfeiture, but laid for the purpose of having the full

punishment imposed, can be said to be an information laid for any penalty or forfeiture. But, if it were, the combination, the conspiracy, was renewed from time to time, at the association's meetings, and when new members were added, and otherwise. So that even if the section were applicable, it would be impossible to give the accused the benefit of the limitation. It would be strange, if a continuing wrong of this character should cease to be a wrong, or to be punishable, because it had been carried on unpunished for two years; and, if so, another strange result would follow, one punishment would give the right to continue the wrong always under the one conspiracy.

The accused is not relieved by this section of the Code.

Another point, which occurred to me during the trial, but which was not relied upon by Mr. Brewster, is, that the coal is not a product of this Dominion, but was produced in a foreign country, and so the pressure to be put upon the dealers there, was something to be done beyond the jurisdiction of this Court; but there was pressure to be brought to bear upon any one selling or buying in this Province; and the combination of dealers and their monopolizing agreement, were entered into in this Province, for the purpose of controlling entirely the sale of the coal and the purchase of it for sale or use, in this Province, and so the case is one within the jurisdiction of this Court. It is not like the case of a conspiracy here to do a wrong wholly in a foreign country, however the law may now be in such a case.

I, therefore, record a verdict of guilty upon the first count, and not guilty upon the other two counts, because not so clearly sustained in evidence and for the reasons before given.

The case is a test one, and one which may well go to the highest of our Courts of Appeal, to settle the law in regard to the enactment, which is said, as yet, to have had no judicial interpretation. The accused acted without an actual knowledge that he was doing wrong, and indeed upon legal advice that he was not. In these circumstances, I was minded to impose the minimum punishment, but the accused prefers and desires to be liberated upon suspended sentence; the Crown consents, and there is no valid objection to that course.

The accused will be bound over in \$4,000, the amount of

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the maximum fine, to appear, when called upon, to be sentenced, as provided for by section 971 of the Criminal Code.

From this judgment the defendant appealed to the Court of Appeal, and the Crown cross-appealed on the ground that the defendant should have been found guilty under sub-sections (b) and (c), as well as under sub-section (d).

The appeal was argued on November 22nd, 1904, before the full Court, composed of MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, J.J.A.

Brewster, K.C., for the defendant's appeal. The appeal is brought under sec. 5 of 52 Vict. ch. 41 (D.) The evidence shews that the object of the association was merely to prevent the wholesaler from selling direct to customers of the members of the association. They were not *prohibited* from so selling, but put to their election by being told, if you do you cannot deal with us—any one has the right to do that. The question here is, has the defendant *unduly* conspired or combined. "Unduly" means "unlawfully:" sec. 516. "Undue" means "not right:" Century Dict. The objects of the association were not unlawful, and any lawful object is not undue or even unreasonable. I refer to *Mogul Steamship Co. v. McGregor, Gow & Co.*, [1892] A.C. 25; *Gibbins v. Medcalfe* (1903), 23 C.L.T. Occ. N. 308; *The Queen v. The American Tobacco Co. of Canada* (1897), 3 Revue Jurisprudence 453; *Bohn Manufacturing Co. v. W. G. Hollis* (1893), 54 Minn. 223; *Payne v. The Western & Atlantic Railroad Co.* (1884), 13 Lea (Tenn.) 507; *Macauley Bros. v. Tierney* (1895), 19 Rd. I. 255. The association was formed in the year 1902, so the prosecution was not commenced in time: sec. 930.

Clute, K.C., contra. The association really dictated who should purchase coal. The members could raise the prices of coal and prevent others from selling lower. The association was a regular monopoly, with complete machinery. New members could not join, as it was considered there were enough in already—that destroyed competition. English and American cases do not assist here, as they are not decided on a statute like ours. Our statute intended to create an offence. For

"Undue preference" and "Unduly preventing competition," see Stroud's Judl. Dict. 2128. He also referred to *Regina v. Frawley* (1894), 25 O.R. 431; *Regina v. Connolly & McGreevy* (1894), 25 O.R. 151. Acts done in pursuance of a common design may be given in evidence: *The King v. Gill & Henry* (1818), 2 B. & A. 204.

John Cartwright, K. C., Deputy Attorney-General. The Act intended the word "unduly" to take the place of "unlawful." There would be no use in passing a statute against anything already unlawful. I refer to *Crump v. Commonwealth* (1888), 10 Am. St. R. 895, at p. 903.

Brewster, in reply.

January 23. The judgment of the Court was delivered by OSLER, J.A.:—The defendant was indicted for an offence against section 520 (*d*) of the Criminal Code, which enacts that every one is guilty of an indictable offence and liable to a penalty not exceeding \$4,000 nor less than \$200, or to two years' imprisonment, who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company (*d*) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any article or commodity which may be a subject of trade or commerce, or in the price of insurance upon person or property.

The indictment came on for trial before Meredith, J., at the sittings of the High Court for the trial of civil and criminal cases at Brantford, in April, 1903, and the defendant elected to be tried by the learned Judge without the intervention of a jury, as provided by section 4 of 52 Vict. ch. 41 (D.). He was found guilty as charged on that count of the indictment framed on the clause of the Code above referred to, and now appeals from the conviction in the manner provided by section 5 of the Act, 52 Vict. ch. 41 (D.).

Mr. Brewster, for the defendant, argued that the word "unduly" in section 520 meant no more than "unlawfully," and that as the acts which were the subject of the alleged conspiracy or agreement were not unlawful, it was not an offence

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within the Act to conspire or combine or agree to do or commit them; (2) That the prosecution was not commenced in time under section 930, which provides that no action, suit or information shall be brought or laid for any penalty or forfeiture except within two years after the cause of action arises or after the offence is committed, unless the time is otherwise limited by the Act, and that in the present case the time began to run from the date at which the agreement was first entered into.

It was proved that the defendant was the president and the active participant in an organization composed of himself and, *inter alia*, some of the persons mentioned in the indictment, known as the Ontario Coal Association, having a formal printed constitution and by-laws, approved on the 22nd September, 1900, which were in force and operation within two years before, and indeed up to the time of the trial.

Constitution: article I., section (2), declares that the object of the association "shall be the protection of its members against the shipment of coal direct to consumers by producers, mine-agents, shippers or jobbers, and the general improvement of the coal trade in the Province of Ontario."

Article V., section (2), provides, that any firm, individual, or corporation having the defined interest as shareholders in the association, and possessed of certain specified business facilities, and who are regularly and continuously engaged in the sale of coal in the Province of Ontario, shall be eligible for membership in the association. Section (4). Any organization of coal dealers in any city or town of the Province shall be eligible for membership and entitled to one vote for each member of their organization. Section (6). Miners, jobbers and wholesale shippers may become honorary members.

Article VII. provides for the mode of hearing and disposing of charges, complaints and grievances. If amicable adjustment cannot be effected, the president is to be notified to call the executive board together for further action.

By-laws: Article V. When notified by the secretary, no dealer or member of any organization belonging to the association shall buy coal of any producer, miner, jobber or shipper who sells any anthracite coal direct to a consumer in any town where there is a member of this association, or who sells to

dealers who refuse to maintain prices fixed by the local organization.

Article VI. Operators lose standing. No producer, miner, jobber or shipper who shall sell coal direct to a consumer in any town or city where there is a member of this association, or to a dealer who refuses to maintain the prices established by the local organization of the town in which he is located, shall be deemed to be in good standing with this association.

Article VII. provides for dealing with claims for violations of the laws of the association. For every sale of anthracite coal made in violation of the provisions of Articles V. or VI. of the by-laws, any member of the association doing business in the town or city where such irregular sale was made, may file a claim for 50c. per ton for all coal thus sold.

By sections (2), (3), and (4) the secretary of the association is to proceed to endeavour to obtain satisfactory redress from the operator or shipper complained of.

If the claimant is dissatisfied with the results obtained by the secretary, he may appeal to the executive board. If his claim is sustained by the executive board, the "defendant" is to be notified of the finding, and if the claim is not paid within ten days thereafter, the secretary shall notify every member of the association that the defendant (giving his name and place of business) is not in good standing with the association. Any member who continues to deal with such operator or shipper after receiving such notice may be expelled from the association on the finding of the board.

Article VIII. The secretary is to publish a list of all members in good standing after the annual meeting, and distribute to members and shippers generally.

Article IX. The association, through its secretary and executive board, desires to co-operate with all other Provincial and State organizations of like aim and purpose, and all operators and shippers who are not in good standing with the association shall be reported to officers of all other associations desiring to co-operate with this association.

A membership list was from time to time published in a small book or pamphlet, shewing such membership to be very widely distributed throughout Ontario: a "look-out list" was

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also published, addressed by the association "To our wholesale friends," containing the names, according to the printed statement on the front page, of persons in various towns and cities in the Province "who are not regular dealers in coal according to the rules of eligibility of our association, and are not entitled to buy at wholesale under the rules of the trade; but who may seek to buy coal in carload lots at towns where our members are located; and sales made to them will cause an injury to our members and may result in trouble for the shipper. Our wholesale friends are requested to keep their list constantly on hand, as it will be a guide to them and a guard against irregular shipments," etc.

There was evidence that coal-dealers and shippers in Buffalo, from where most of the anthracite coal used in the western part of the Province was procured, had refused to sell coal wholesale to persons in Ontario who were not members of the association, and for that reason; and that dealers in Ontario could not become members of the association as of right; and that at least one application had been refused, because the state of the coal business would not admit of additional competition; and also that persons on the "look out" list could not purchase except at retail or net ton prices from members of the association. In short, it was proved, perhaps unnecessarily, except for the purpose of shewing the continued existence of the agreement and of the objects of the association, as indicated by their constitution and by-laws, that it was in effective and active operation according to the terms therein set forth.

In Mr. Tremear's useful edition of the Criminal Code, the various amendments of which section 520 has been the subject are well pointed out: p. 427.

As the section was originally framed, it simply imposed penalties in respect of a conspiracy to commit some unlawful act "unduly" in transactions of the nature of those mentioned in clauses (a), (c) and (d). What was or might be unlawful was left to be ascertained by the general law of the land on the subject, the limited scope of which, and the difficulty of its application, is well seen by such cases as *Mogul Steamship Co. v. McGregor, Gow & Co.*, [1892] A.C. 25, and *Bohn Manufacturing Co. v. W. G. Hollis*, 54 Minn. 223, and *Macauley*

Bros. v. Tierney, 19 Rh. I. 255. When this was further qualified by the word "unduly," it might seem that Parliament had defeated its own object, whatever it may have been, and had made the section unintelligible and innocuous by attaching a penalty only to a conspiracy to do an unlawful act unduly.

The difficulty became partially evident to the legislators of 1899, when the word "unduly" was struck out of the sub-clauses (a), (c) and (d). This left the application of the general law untrammelled within its narrow limits; but in the session of 1900 Parliament shewed that it meant to go further, and did so, by striking the word "unlawfully" out of the section, and restoring the word "unduly" to the sub-clauses referred to. Thus we are no longer thrown back upon the general law to ascertain what is (a) an unlawful limitation of the facilities for transporting, etc., articles or commodities which may be the subject of trade or commerce; (c) unlawfully preventing the manufacture or production of such article or commodity, or (d) unlawfully preventing or lessening competition in its production, purchase, etc. It is the conspiracy to do these things *unduly* which is now made unlawful and an offence within the meaning of the section. I agree with the construction which has been placed upon it by my learned brother Meredith in this respect, and the cases I have referred to are of no assistance, as they would not improbably have been different in their result had the law for the courts which decided them been like ours. What is "undue" with reference to the acts which are the subject of the conspiracy, combination, agreement, or arrangement is now a question of fact upon the circumstances of each particular case, and I am unable to say that my brother Meredith was wrong in holding that the conspiracy, or agreement, or combination, by whatever name it may be called, proved in the present case, was one to unduly prevent or lessen competition in the purchase, sale, or supply of anthracite coal, which is a subject of trade or commerce of vital necessity to every member of the community.

The right of competition is the right of every one, and Parliament has now shewn that its intention is to prevent oppressive and unreasonable restrictions upon the exercise of this right; that whatever may hitherto have been its full extent, it

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is no longer to be exercised by some to the injury of others. In other words, competition is not to be prevented or lessened *unduly*, that is to say, in an undue manner or degree, wrongly, improperly, excessively, inordinately, which it may well be in one or more of these senses of the word, if by the combination of a few the right of the many is practically interfered with by restricting it to the members of the combination.

The plain object of this association was to restrict and confine the sale of coal by retail to its own members, and to prevent any one else from obtaining it for that purpose from the operators and shippers.

That the laws of the association were in some, if not in large measure, effective in attaining this object by their pressure, as well upon the dealers in Buffalo, as upon those persons in this country who desired to procure coal, and the members of the association who infringed its rules, was amply shewn by the evidence.

It was contended that the combination was not within the statute because it affected only the supply at the source in a foreign country, but that is not its whole scope or limit by any means. It strikes at competition in this country in the supply and sale of coal here, and it is immaterial that it affects the conduct of the foreign vendor also, when that has reference to and affects persons resident here: *State v. Lancashire Fire Ins. Co.* (1899), 66 Ark. 466, 477; and see *The People of the State of New York v. Sheldon* (1893), 139 N.Y. 251; 20 Am. & Eng. Ency., 2nd ed., 854, 855.

As regards the objection that the prosecution was too late, and is barred by section 930 of the Code, it may admit of doubt, whether that section can apply to a prosecution by indictment, but, if it does, the objection fails because the offence was a continuing one. The association remained in existence under and was governed by its by-laws and constitution, and its members, including the defendant, continued to act thereunder up to the time the prosecution was begun.

For these reasons the appeal must be dismissed and the conviction affirmed.

As to the cross-appeal of the Crown, which asks that the defendant may be convicted on those counts of the indictment on which he was acquitted, I think it is sufficient to say that section 5 of the Act already referred to only gives an appeal from a conviction. The cross-appeal is therefore also dismissed.

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EARLE V. BURLAND.

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April 4.

Costs—Appeal to Privy Council—Costs Incurred in Canada—Ascertainment—
R.S.O. 1897, ch. 48, sec. 7—Con. Rules 818, 1255 (818a).

On an appeal from an order granted to the defendants upon a petition, pursuant to the suggestion in the judgment herein, reported 8 O.L.R. 174, at p. 176:—

Held, that Rule 1255 (818a) gives effect to R.S.O. 1897, ch. 48, sec. 7, and Rule 818, and does not carry the procedure beyond what is therein provided for, and that by applying it, or even without it, the defendants were entitled under the Act and Rule 818 to have the costs ascertained "as if the decision had been given in the Court below" and the appeal was dismissed with costs.

Judgment of FALCONBRIDGE, C.J.K.B., affirmed.

THIS was an appeal by the plaintiffs from a judgment of Falconbridge, C.J.K.B., granting an order to the defendants, with a reference to the senior taxing officer to ascertain the amount due them for costs incurred in Canada of an appeal to His Majesty in his Privy Council, and by an order of the Privy Council directed to be paid by the plaintiffs to the defendants.

The order of the learned Chief Justice was granted upon the petition of the defendants made pursuant to the suggestion in the judgment of Street, J., in this action, and gave the defendants the costs of the petition and reference, reported 8 O.L.R. 174, at p. 176.

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The appeal was argued on the 15th March, 1905, before a Divisional Court, composed of MEREDITH, C.J.C.P., TEETZEL, and CLUTE, JJ.

D. L. McCarthy, for the appeal, contended that there was no jurisdiction in the taxing officer to tax such costs, as had been held by Street, J., in his judgment and that even if the order of the Privy Council had been made an order of the High Court, the jurisdiction of the High Court was limited to the Province of Ontario, and could not govern costs in the Privy Council, and cited the judgment of Street, J., also *Holdsworth v. Barsham* (1862), 2 B. & S. 480; *Holdsworth v. Wilson* (1863), 4 B. & S. 1.

W. E. Middleton contended that as the defendants' right to the costs in question was established by the order of the Privy Council, the only question here was the proper procedure to ascertain the amount. The defendants brought in their bill before the taxing officer (before Rule 1256 was passed), and at the instance of the plaintiffs, the taxing officer held that he could not tax without some specific direction from the Court, and after Rule 1256 was passed, the defendants brought in their bill assuming that this Rule applied, but Street, J., held it was not applicable to cases in which judgment had already been pronounced. The defendants had now adopted the only course open, and asked the Court to make an order supplementary to the order of the Privy Council, which had been made a judgment of this Court, referring it to some officer to ascertain the amount properly payable under that judgment. If this could not be done the defendants might be without remedy, as it had been held that an action will not lie for costs till they have been taxed. He referred to Con. Rule 646; *Daniels Chy. Prac.*, 7th ed., vol. 1, p. 650; *Salt v. Cooper* (1880), 16 Ch. D. 544.

McCarthy, in reply.

April 4. CLUTE, J.:—This is an appeal by the plaintiffs from an order made by the Chief Justice of the King's Bench, dated the 8th of February, 1905, upon a petition of the defendants, directing that it should be referred to the senior taxing officer to ascertain the amount to which the petitioners are

entitled under the terms of the order of His Majesty's Privy Council of 10th of December, 1901, with reference to the costs incurred in Canada in relation to an appeal to His Majesty, and directing plaintiffs to pay to the defendants the costs of the petition and reference.

R.S.O. 1897, ch. 48, sec. 7, provides that costs awarded by the Privy Council upon an appeal shall be recoverable by the same process as costs awarded by the Court of Appeal. Rule 818 after providing that the decision of the Court of Appeal shall be certified, etc., enacts that "all subsequent proceedings may be taken thereupon, as if the decision has been given in the Court below."

The order of the Judicial Committee of the Privy Council has been filed and has become an order of the High Court.

Rule 1255 (818 *a*) provides that on filing the order of the Privy Council, with the officer of the High Court with whom the judgment appealed from is entered, he shall cause the same to be entered, etc., "and all subsequent proceedings may be taken thereon, as if the decision had been given in the Court below." This Rule is simply giving effect to the above Act and to Rule 818, and does not carry the procedure beyond what is therein provided for. It is a rule of procedure and applies, I think, to the present case. But even without Rule 1255, the defendants are entitled under the above Act and Rule 818 to have the costs ascertained "as if the decision had been given in the Court below."

I think the appeal should be dismissed with costs.

MEREDITH, C.J., and TEETZEL, J., concurred.

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May 22.

THOMAS V. TOWNSHIP OF NORTH NORWICH.

Municipal Corporations—Highway—Negligence—Repairs—Want of Warning—Proximate Cause of Accident—Horse beyond Control.

Where two causes combine to produce an injury, both of which are in their nature proximate, the one being a defect in a highway and the other some occurrence for which neither party is responsible, a municipal corporation is liable in damages if the injury would not have been sustained but for the defect in the highway.

The defendants were held liable in damages because while they were repairing a bridge on a highway they failed to give warning or put up a barrier, and an accident happened in consequence of a driver's attempt to turn suddenly off the highway when he came to the bridge, his horse at the time being almost beyond his control in consequence of a break in the harness.

Judgment of Idington, J., reversed.

APPEAL by the plaintiff from the judgment at the trial.

The action was brought by the plaintiff, a child three years of age, by his father as next friend, to recover damages for injuries sustained by him owing to the alleged negligence of the defendants while repairing a bridge on a road under their jurisdiction.

The bridge in question was in a small ravine, the hill or incline on each side not being either long or steep. The repairs were begun some weeks before the accident, and for use during their progress a temporary road or track was made turning off from the ordinary road on each side of the bridge a short distance from it. The plaintiff on the 7th of June, 1904, was driving with his father in a waggon loaded with potatoes and drawn by one horse, and they reached the incline leading to the bridge about one o'clock in the afternoon on that day. At the beginning of the incline part of the harness broke, the shafts fell down, and the horse began to run. The plaintiff's father was able to guide the horse but not to check it and decided to let it run down the slope trusting to being able to stop it on the ascent on the other side. There was no barrier across the road at the turning off place and nothing there to call attention to it except the track itself. About fifty feet past the turning off place and close to the bridge there was as an intended barrier a stick of timber about twenty-four feet

long and about ten by twelve inches square placed diagonally across the road, and this had been in this place from the time the repairs were begun. The plaintiff's father did not know the locality. He did not notice the turning off track and had no warning of the impassable condition of the bridge until he came to the stick of timber. He then tried to turn off the road but the waggon overturned. As it was turning over the father, fearing that the heavy load would fall on and hurt the child, threw him to one side, and the child's leg was broken by the fall.

The action was tried at Woodstock on the 19th of December, 1904, before IDINGTON, J., who dismissed the action but assessed the damages at \$400. See 4 O.W.R. 517.

The appeal was argued before a Divisional Court [BOYD, C., MACMAHON, and TEETZEL, JJ.], on the 18th of May, 1905.

W. M. Douglas, K.C., for the appellant. The learned Judge has held that the father's attention was distracted by the breaking of the harness and the consequent care he had to give to the horse, and that this was the cause of the accident. He has come to the conclusion that the case is governed by *Bell Telephone Co. v. Chatham* (1900), 31 S.C.R. 61. But this is an erroneous view. In that case there was no negligence or want of repair. The pole complained of was lawfully in the highway and the case was just the same as if the horses when running away had run into a house adjoining the highway. Here the position of matters is quite different. There was negligence in not putting up a barrier at the turning off place, or giving some reasonable warning. The stick of timber was in the wrong place and was not such an object as a driver would be likely to see. *Sherwood v. Hamilton* (1875), 37 U.C.R. 410, states the principle applicable where a horse runs away or becomes unmanageable, and governs this case. If the defect is in part the cause of the accident the fact that the horse has run away does not absolve the municipality from liability. *Foley v. East Flamborough* (1899), 26 A.R. 43, is a recent example of the application of this doctrine, and *Sault Ste. Marie Pulp Co. v. Myers* (1902), 33 S.C.R. 23, may also be referred to on

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this question of concurrent causes. When the father saw the danger he did the best he could and he is not to be blamed because the course taken in the emergency led to an unfortunate result: *Rowan v. Toronto Railway Co.* (1899), 29 S.C.R. 717.

J. C. Makins, for the respondents. The defendants are not responsible for the accident, which resulted from the driver's attempt to turn too sharply. He would, if he had been paying attention to where he was going, as he was bound to do, have seen that work was being done at the bridge and that there was a place to turn off. The stick of timber was a conspicuous object and no barrier would have been of any avail with the horse in its unmanageable condition. The accident therefore resulted either from want of care on the father's part or from the breaking of the harness caused by too heavy a load and in either event there is no liability imposed on the defendants. *Sherwood v. Hamilton* and *Foley v. East Flamborough*, are distinguishable because here there was no defect or obstruction.

Douglas, in reply.

May 22. The judgment of the Court was delivered by BOYD, C.:—The contemporaneous account of the accident as related by the father to the first comer Michael Furlong (a witness called by the defendants) may be accepted as correct. It is thus reported:—"He came up and told his story, said he had gone down with a one horse rig and a load of potatoes; and he said his trace unhitched coming down hill and his horse started to run and he calculated to stop the horse going up the other hill on the south, but he did not know the bridge was down and he came upon this square stick of timber before he noticed and he had no alternative but to turn off down this grade and it upset him."

This piece of timber 26 feet long and squared about 10 × 12 inches was placed anglewise across the road to the bridge so as to bar travel about 53 feet from where the substituted road began to turn out and beyond this obstruction lying on the highway there was no other warning to travellers as to the situation. The bridge had been condemned as unfit for travel on the 29th of April and the accident was on the 7th of June, 1904.

It appears from all the evidence that after the break in the harness the next friend of the plaintiff had his horse under control though it was going at a good pace and there is no negligence or want of skill attributable to him in his management of horse and vehicle. The man allowed the horse to go at accelerated speed after the accident along the usual road to the bridge but attention was not called to the necessity of turning into the substituted road until it was too late to turn with safety. He was watching the horse and the vehicle and was assuming that the road was safe and in proper and usual condition as all travellers are entitled to do in the absence of notice or knowledge to the contrary.

These being the facts what is the law as to this particular claim for damages?

In *Sherwood v. Hamilton*, 37 U.C.R. 410, the various conflicting American cases on the point of municipal liability were somewhat considered by Harrison, C.J., and he indicated that the view entertained by the New Hampshire courts is preferable to that favoured in Maine and other States. The rule adopted in the *Sherwood* case (which is also in conformity with the decision in the leading case of *Toms v. Whitby* (1874), 35 U.C.R. 195, affirmed by the Court of Appeal, (1876), 37 U.C.R. 100, is this that where two causes combine to produce the injury both of which are in their nature proximate, the one being a defect in the highway and the other some occurrence for which neither party is responsible then the corporation is liable provided the injury would not have been sustained but for the defect in the highway.

Thus a plaintiff is held entitled to recover damages if without fault or negligence on his part his horses escape from his control and become unmanageable so that no care can be exercised by him in respect of them—this condition of things not being produced by the defect in the highway through which defect the injury complained of has been occasioned. Such was the plight of the party, next friend of the plaintiff in this case, when going down the incline; part of the harness got out of gear by accident not to be foreseen, and the horse drew off his attention from the road so that he was not aware that he was on a track that had been closed from travel till it was too late

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to turn off or go on without incurring danger. He chose the alternative which he deemed best at the moment and as the result his vehicle overturned and the child, the plaintiff, was considerably injured.

The learned Judge who tried the case seems to have thought that the condition of the road was not the proximate cause of the accident but that it arose from the horse becoming unmanageable and so nonsuited the plaintiff. That does not appear to be a proper result if the roadway was not under the circumstances in proper repair. This point is covered by an exposition of the law in cases cited by the Court in *Boswell v. Yarmouth* (1879), 4 A.R. 353. The doctrine applicable is thus expressed: where a road is so constructed or altered as to present at one part two paths both of which exhibit the appearance of having been used by travellers and one leads to a dangerous place and the other is quite safe, it is the duty of those in charge of the road to indicate in a manner not to be mistaken by day or by night that the unsafe path is to be avoided and if it cannot otherwise be done to put up such an obstruction as will turn the traveller from the wrong track. According to that test which, though drawn from American sources, commends itself as a very proper one the defendants failed in their duty in this case. The barrier to my mind was not sufficient in shape, size or position. It was a mere stick of wood laid at angles along and across the road leading to the bridge being repaired some 10 x 12 inches in size and some 53 feet distant from the beginning of the bifurcation of the substituted road to be used during the repairs. This barrier was not noticed by the plaintiff until he got close upon it and when it was too late to avoid some accident. Such a piece of wood weathered by some weeks' exposure would possess no conspicuous appearance and to an occasional driver would possess no significance till it was actually come upon in his course, especially if his attention was diverted by a horse temporarily restive through no fault of the driver.

The trial Judge has assessed the damages at \$400 if the plaintiff should be entitled to recover, and this should be in our opinion the amount of the verdict which we now direct to be entered for the plaintiff.

I may add that the great weight of American decision is in favour of the Ontario rule in the case of concurring causes of injury, as may be seen by reference to Jones on Liability of Municipal Corporations for Tort, 1901 ed., pp. 171-175.

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GREEN V. STEVENSON.

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May 13.

Specific Performance—Statute of Frauds—Memorandum in Writing—Receipt—Omitted Terms—Registry Act—Notice—Solicitor.

The owner of a house orally agreed to sell it for \$400, payable \$50 in cash and \$350 by the assumption of a mortgage, the purchaser to pay the taxes for the current year and interest on the mortgage from a date some months prior to the making of the agreement. The purchaser paid \$10 at the time, and received from the vendor the following receipt: "Received from Mr. E. G. the sum of \$10 on house and lot number (describing it) sold by Mr. J. S. for \$350 by paying \$50 to Mr. S., allowing one-half for lawyers' fees, also paying water rates. Balance \$40 on house":—

Held, that it might properly be inferred from this receipt that E. G. was the purchaser and that the price was \$400, and that, had the matter rested there, the receipt would have been a sufficient memorandum; but that the omission of the admitted terms as to taxes and interest was fatal to its sufficiency.

Martin v. Pycroft (1852), 2 D. M. & G. 785, considered.

Judgment of Teetzel, J., reversed.

Notice to a solicitor acting for a would-be purchaser, of a prior agreement for sale, is notice to the client, who cannot upon an agreement for sale being entered into with him claim the benefit of the Registry Act.

APPEAL by the defendant Bowerman from the judgment at the trial.

The action was brought for specific performance of an agreement for the sale by the defendant Stevenson to the plaintiff of a house in Hamilton. In October, 1904, the defendant Stevenson orally agreed to sell the house to the plaintiff for \$400, payable \$50 in cash and \$350 by the assumption of a mortgage. The plaintiff also agreed to pay the taxes for the year 1904 and interest on the mortgage from the 14th of May, 1904. At the time the agreement was made the plaintiff paid Stevenson \$10 and obtained the following receipt: "Hamilton, Oct. 10, 1904.

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Received from Mr. Edwin Green the sum of ten dollars on house and lot, number 328 East Avenue, sold by Mr. James Stevenson for \$350 by paying fifty dollars to Mr. Stevenson, allowing one-half for lawyer's fees, also paying water rates. Balance \$40 on house. M. J. Stevenson."

The defendant Stevenson subsequently sold and conveyed the house to the defendant Bowerman, her solicitor knowing of the previous agreement with the plaintiff.

The action was tried at Hamilton on the 2nd of December, 1904, before TEETZEL, J., who gave judgment in the plaintiff's favour.

The appeal was argued before a Divisional Court [MEREDITH, C.J.C.P., BRITTON, and ANGLIN, JJ.] on the 6th of April, 1905.

E. E. A. DuVernet, and *W. L. Ross*, for the appellant. The receipt is not a sufficient memorandum in writing under the Statute of Frauds. It does not represent the actual agreement. The writing cannot be enforced because it is not the agreement and the agreement cannot be enforced because it is not in writing: 29 Am. & Eng. Enc. of Law, 2nd ed., p. 824; Pollock on Contracts, 7th ed., p. 511; *Price v. Ley* (1863), 4 Giff. 235, at pp. 252-3; Browne on the Statute of Frauds, 5th ed., pp. 505 to 511. The price is uncertain: 29 Am. & Eng. Enc. of Law, 2nd ed., pp. 868-870; Fry on Specific Performance, 4th ed., p. 225; 11 Enc. of the Laws of Eng., p. 660; *In re Kharaskhoma Exploring and Prospecting Syndicate*, [1897] 2 Ch. 451; *Seymour v. Warren* (1901), 59 N.Y. Appell. Div. 120; and the purchaser is not named: *Vandenbergh v. Spooner* (1866), L.R. 1 Ex. 316; *White v. Tomalin* (1890), 19 O.R. 513. The appellant was a *bonâ fide* purchaser without notice: *In re Cousins* (1886), 31 Ch. D. 671; *Kennedy v. Green* (1834), 3 M. & K. 669.

J. P. Mabee, K.C., for the respondent. Specific performance can be decreed with a variation: Fry on Specific Performance, 4th ed., p. 353. The contract cannot be varied, but if the plaintiff admits terms against himself he has the option of enforcing specific performance. There is therefore no objection in this case on the ground that the receipt does not refer to the taxes and interest. In other respects the receipt is a sufficient

memorandum. The proper inference is that the payment was made by Green as purchaser and the price is indicated clearly enough. The appellant is bound by the solicitor's knowledge obtained while acting for her in the very transaction in question.

DuVernet, in reply, referred to *McIntosh v. Moynihan* (1891), 18 A.R. 237.

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May 13. ANGLIN, J.:—The plaintiff in his statement of claim alleges an agreement for sale to himself at \$400, making no reference to the terms as to interest and taxes. He frankly admitted them, however, in his evidence at the trial upon cross-examination. The defendant Stevenson by his plea denies the contract *in toto*, and sets up the Statute of Frauds. He does not allege that the receipt of the 10th of October, the only memorandum of the bargain, omits the special terms as to interest and taxes. His application to amend by specifically pleading these omissions as a defence the learned Judge refused. It is not clear that this amendment was not sought on behalf also of the defendant Bowerman.

The defendant Bowerman alleges a purchase from Stevenson for value without notice of the interest of the plaintiff, and claims the protection of the Registry Act. She did not originally plead the Statute of Frauds, but gave notice of motion that she would seek leave at the trial to amend by setting up this defence. The reporter's notes of the proceedings at the trial do not shew that such an application was made on her behalf, but the learned trial Judge's book contains a note that he allowed this defendant to plead the Statute of Frauds by way of amendment, subject to terms as to costs. I therefore assume that such an amendment was made. No doubt even if not allowed at the trial it would be our duty now to allow such amendment upon proper terms, having regard to the decisions in *Williams v. Leonard* (1896), 16 P.R. 544; 17 P.R. 73; and in *Patterson v. Central Canada Savings Company* (1897), 17 P.R. 470. The defendant Stevenson though represented at the trial, does not appeal from the judgment against him.

My learned brother Teetzel expresses in very decided terms his view that the sale by Stevenson to Bowerman was made

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malá fide. He finds in effect that the solicitor for Mrs. Bowerman had full knowledge of the previous sale to Green and with such knowledge, acting for Bowerman, "allured" Stevenson to sell to his client for the paltry advance of \$25. The motive which induced this reprehensible conduct, so scathingly denounced by the learned trial Judge, was, he suggests, a prospective profit of some \$200 to be made by a resale of the house and to be shared between the solicitor and Bowerman.

Counsel for the appellant urges these grounds of appeal, viz: 1st. That the notice which Bowerman had through the solicitor was constructive merely, and therefore insufficient to deprive the client of the protection of the Registry Act.

2nd. That from the receipt of the 10th of October it is not possible to glean with certainty the terms of the agreement between the parties;

3rd. That the receipt does not shew Edwin Green to be the purchaser;

4th. That it being admitted in evidence that the receipt does not contain all the terms of the bargain, it is not a sufficient memorandum to satisfy the requirements of the 4th section of the Statute of Frauds.

Upon the first point the evidence amply supports the findings of the learned Judge that the solicitor acted as solicitor for Bowerman, and that he had full knowledge of the prior sale to the plaintiff. He obtained this knowledge in the very transaction in which he represented Bowerman. If he kept Bowerman in ignorance of the plaintiff's position he did so in breach of his duty and for the sinister purpose of enabling Bowerman to advance a plea of want of notice. In this he cannot succeed. Actual notice to the solicitor had in the transaction in which he represents his client is actual notice to that client.

The remaining grounds of appeal rest on the Statute of Frauds.

The trial Judge thought it plain upon the receipt that the contract was for a sale at \$400 of which \$350 was to be paid by the assumption of the existing mortgage and \$50 in cash. I find no difficulty in deducing such a contract from the receipt. In my opinion it admits of no other construction. The second ground of appeal is therefore untenable.

It is true that Edwin Green is not in this receipt described as the purchaser. But neither does anything appear to suggest that he is making payment in any representative capacity. *Primâ facie* he is paying upon his own account, and therefore as purchaser. In *Evans v. Prothero* (1852), 1 D. M. & G. 572, a similar receipt was the sole memorandum. No exception was taken to it upon this ground. It can hardly be supposed that a point so obvious, if at all tenable, would have entirely escaped the attention of counsel, who, for want of anything better, were driven to rely upon the absence of a stamp upon the receipt as their sole objection to its sufficiency. I have no doubt that the receipt in evidence here sufficiently shews Edwin Green to be the purchaser from Stevenson.

The remaining and most formidable objection is that founded upon the omission from the receipt of all reference to the special terms as to interest and taxes. These terms, admittedly a part of the bargain, rest in parol. Can the Court against a resisting defendant, who pleads the Statute of Frauds, decree specific performance of an agreement, within the purview of that statute, of which an essential term is not in writing? Cases in which the requirements of the statute have been satisfied by part performance must be put carefully aside as must also cases in which the written memorandum is absent or defective because of the fraud of the defendant.

I am unable upon principle to distinguish such a case as this from the long line of decisions by which it has been established that, although the defendant in his plea admits a verbal agreement, it cannot be enforced against him if he nevertheless insists upon the bar of the Statute. To enforce against an unwilling party, pleading the Statute, a mere verbal contract which he admits, would do no greater violence to the provisions of the Statute than would be done by enforcing against such a party a contract of which only some of the essential terms are evidenced by writing.

There has been much discussion upon the question whether on the ground of mistake a Court of Equity may upon parol evidence reform a written agreement, and may in the same action decree specific performance of the rectified instrument. When this question arises upon an executory agreement for the

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sale of lands, and is complicated by a plea of the Statute of Frauds the learned Chief Justice of the Common Pleas, delivering the judgment of a Divisional Court in *Knapp v. Carley* (1904), 3 O.W.R. 940, declares it to be important and difficult. Learned writers express the view that this double relief may be given in cases not within the Statute of Frauds: Fry on Specific Performance, 4th ed., p. 353; Kerr on Fraud, 3rd ed., p. 459; and judicial countenance has been given to this view: *Olley v. Fisher* (1886), 34 Ch. D. 367. But from these statements cases within the Statute of Frauds have been carefully excepted. Mr. Cyprian Williams in his recent book on Vendor and Purchaser, expresses, at p. 707, the view that if the decision in *Olley v. Fisher* "be right there is no reason for not extending it to a case where the Statute is pleaded," because, he says, "it is settled that the Statute can afford no defence to an action for rectification." The cases which he cites upon this latter point upon examination appear to be all cases in which not executory contracts, but deeds or documents evidencing executed contracts have been rectified: see pp. 700, 703. Moreover, as Mr. Williams says, before there can be rectification there must be evidence of a common intention that the document to be rectified should contain the whole contract and that the omitted terms were left out by fraud or mutual mistake: p. 701. In many cases where plaintiffs have sought specific performance of agreements relating to land, the terms of which have been only partly evidenced in writing, there have been very emphatic expressions of opinion that such relief, against an unwilling defendant, who pleads the Statute, must be denied. Thus in *Attorney-General v. Sitwell* (1835), 1 Y. & C. Exch. 559, Alderson, B., at p. 583, says: "I cannot help feeling that in the case of an executory agreement, first to reform, and then to decree an execution of it would be virtually to repeal the Statute of Frauds." In *Davies v. Fitton* (1842), 2 Dr. & War. 225, at p. 232, Lord St. Leonards says: "I cannot decree specific performance with the variation of a new term, no matter how inconsiderable that term may be, as for instance payment of taxes, nor how clearly that term may be proved by parol evidence." Numerous other cases are cited in the text books and digests. See, for instance, Fry on Specific Performance, 4th ed., sec. 815. There are some dicta from which

an inference may be drawn that certain judges inclined to a contrary view, but nowhere do I find that view in terms expressed, nowhere can I find that it has ever been made the basis of a binding and authoritative decision, unless, perhaps, in the case of *Martin v. Pycroft* (1852), 2 D. M. & G. 785, referred to below. In many of the text books there is much learning expended upon a discussion of the question whether rectification and enforcement can be granted simultaneously. The late case, *May v. Platt*, [1900] 1 Ch. 616, casts some doubt upon the right to grant such double relief even in cases to which the Statute of Frauds does not apply. But the weight of English opinion seems to favour the exercise of such jurisdiction in those cases, and with us the question is so concluded: *Carroll v. Erie County Natural Gas and Fuel Company* (1899), 29 S.C.R. 591, 594; *Clark v. Walsh* (1903), 2 O.W.R. 72.

Where the Statute of Frauds applies, however, the plaintiff's difficulty is not due to his demand for double relief, it consists in this—that though the contract be rectified the portion of it which is evidenced by parol is not and cannot be thus made an agreement, memorandum, or note in writing signed by the party to be charged. It is not until he seeks to enforce the contract that the plaintiff really brings action upon it. In seeking rectification he brings suit which concerns the contract, not, in reality, upon it. So that even though in cases within the Statute a plaintiff seeking rectification may establish his right to that relief by parol testimony, it by no means follows that he is therefore entitled to further relief upon the contract so rectified.

We are not, however, here dealing with the reformation of an executory written agreement. The document before us is merely a receipt which cannot be said, except *prima facie* perhaps, to purport to contain all the terms of the contract to which it refers. Some of those terms it no doubt does set forth. But it is quite consistent with the receipt serving all the purposes for which, as a receipt, it was designed, that there should be terms of the contract to which it relates not embodied in it. Evidence of such additional terms in no wise conflicts with the receipt and their omission from the receipt cannot be urged as a ground for rejecting parol testimony adduced to

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prove them. Reformation of a written instrument is not in question. Neither can it be said that the omission of the terms as to taxes and interest is shewn to be a mistake. Their inclusion in a mere receipt may well have been deemed quite unnecessary.

Perhaps the strongest argument for the plaintiff is furnished by the decision of the Lords Justices in *Martin v. Pycroft*, 2 D. M. & G. 785. In that case an agreement in writing for a lease, otherwise complete, omitted a term requiring the plaintiff to pay a premium of £200. The plaintiff, seeking specific performance, by his bill stated this omission, and offered to pay the premium. The defendant set up the Statute of Frauds unsuccessfully, the Lords Justices, in reversing Parker, V.-C., declaring that in such a case the defendant could only ask the Court to refuse its aid unless the plaintiff would consent to performance of the omitted term. The fact that the plaintiff Green does not in his statement of claim set out the omitted terms and offer to perform them does not in my opinion distinguish this case from *Martin v. Pycroft*. On cross-examination by defendant's counsel, the plaintiff admits these terms, and his position is that he is ready to perform them as a condition of obtaining specific performance.

In *Martin v. Pycroft* had the plaintiff chosen to insist upon his written agreement without variation the defendant could have successfully resisted its enforcement only by the aid of a Court of Equity permitting him to adduce parol evidence, inadmissible at law, to vary or add to its terms. That aid the Court might well refuse to the defendant unless upon the condition that he do equity by submitting to a decree for specific performance with the variation or addition which such parol evidence disclosed. It is not surprising that in such a case the plaintiff should be in no worse plight because of his frankness in stating the omitted term in his bill and of his docility in offering to perform it, thus rendering the introduction of parol testimony to prove it unnecessary. Having regard to the grounds upon which the decision proceeds I cannot reconcile *Martin v. Pycroft* with the strong and uniform current of authority that neither at law nor in equity can a plaintiff, against a defendant resisting and pleading the Statute of Frauds, enforce a contract whose

terms are not evidenced by a memorandum in writing sufficient to satisfy that Statute, unless upon the ground that equity, when allowing advantage to be taken of its own rule permitting parol proof of an omitted term, does so upon such conditions as are in the particular case deemed equitable.

Here, however, we are dealing with a mere receipt. The defendant is not obliged to seek any special favour from a Court of Equity in defending himself against the plaintiff's claim. The receipt not purporting to contain the whole terms of the bargain offers no legal impediment to the introduction of parol evidence to prove terms which it omits. The contract was, for aught that appears to the contrary, designedly left partly in parol. Its special equitable jurisdiction not being invoked by the defendant or requisite to his defence, the Court is not in a position to impose terms upon him. He defeats the plaintiff's claim without any indulgence which it is peculiarly the province of a Court of Equity to afford. By evidence admissible in any Court he shews a parol contract of which only some of the terms are evidenced as required by the Statute of Frauds. His defence is thus complete. By no known process can those terms not so evidenced be put in a writing signed by the defendant. Nothing less can constitute an enforceable agreement so long as the Statute of Frauds prevails. There is no fraud, no mistake, even if that would suffice, to enable the Court to avoid the effect of the Statute; no part performance to satisfy it in the absence of a sufficient memorandum.

With much regret, because of the dishonesty of the defendant's conduct, which called forth such deservedly severe condemnation from the learned trial Judge, I find myself compelled to hold for the reasons above indicated that this action cannot succeed. In allowing the defendant's appeal, however, in my opinion we should mark our abhorrence of the conduct of herself and of those by whom she has been advised by withholding all costs from her.

The appeal will be allowed, therefore, without costs and the action dismissed likewise without costs. The appellant must, however, comply with the terms which the learned trial Judge would, had he given effect to her plea of the Statute, no doubt have imposed as a condition of her being allowed to amend at

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the trial by then setting up that plea. She will be ordered to pay to the plaintiff his costs of this action from delivery of defence down to the opening of the trial.

MEREDITH, C.J. :—I agree with the judgment just read.

BRITTON, J. :—I agree in the result—that the appeal should be allowed without costs, and the action dismissed without costs.

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[DIVISIONAL COURT.]

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May 15.

IN RE LUMBERS AND HOWARD.

Landlord and Tenant—Overholding Tenants Act—Alterations in Lease—Summary Adjudication.

Under the Overholding Tenants Act, as now amended, R.S.O. 1897, ch. 171, it is the duty of the Judge upon an application for possession if he is satisfied that the case made out by the landlord is a clear one upon both the facts and the law to exercise the summary power conferred upon him ; but if his conclusion is that the case is a doubtful one either upon the facts or the law then he should leave the parties to proceed in the ordinary course to determine the matters in dispute between them.

In such proceedings the Judge has power to determine summarily such a question as the validity of alterations appearing in the copy of the lease in question produced by the tenant although there is a direct conflict of testimony as to the time when and the person by whom the alterations were made.

Order of MACMAHON, J., affirmed.

APPEAL by the tenant, Howard, from an order made in a proceeding under the Overholding Tenants' Act.

The landlord, Lumbers, applied to the Judge of the county court of York for an order for possession of the premises in question, producing a lease executed by himself and the tenant which shewed that the term was for three years and had expired before the application was made. The tenant produced a lease executed by himself and the landlord providing for a term of five years, the word "three" as originally written

having been changed to "five" and the change not being initialled. Both in the lease produced by the landlord and in the counterpart produced by the tenant there were a number of changes and interlineations. Those in the lease produced by the landlord were initialled by the witness and the corresponding changes in the counterpart produced by the tenant were also initialled by the witness. There were however in the counterpart produced by the tenant a number of additional alterations besides the change of the word "three" to "five" above referred to, and these additional changes were not initialled. The tenant swore that all the changes had been made before the lease was executed and his solicitor corroborated this evidence by stating that he had made some of the changes in question and that the lease was not executed at the time the changes were made.

The Judge of the county court made a summary order for possession, refusing to direct the trial of an issue.

The tenant applied to the High Court to review the proceedings and the application was heard before MacMahon, J., on the 9th of May, 1905, and he refused to interfere.

The appeal was argued before a Divisional Court [MEREDITH, C.J.C.P., BRITTON, and TEETZEL, JJ.] on the 15th of May, 1905.

W. H. Blake, K.C., for the appellant. The Judge of the county court should not have determined this case on a summary application. It is quite clear that only very simple cases should be determined in that way. It is true that the Overholding Tenants' Act, R.S.O. 1897 ch. 171, is not now as limited in its terms as it used to be. The striking out of the words "without colour of right" by 58 Vict. ch. 13, sec. 23, has no doubt had the effect of giving the Judge of the county court jurisdiction to decide applications where there is some contest but it is evident on a careful reading of the sections of the Act that only the simplest cases can be treated in this summary way. It is only when the Judge is satisfied that the tenant "wrongfully" holds and that the case is "clearly" one within the Act that he is entitled to grant an order for possession. These adverbs are, it has been held, to be taken into

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consideration in arriving at the true intent of the Act: *Re Snure and Davis* (1902), 4 O.L.R. 82. The decisions as to the scope of the Act are somewhat inconsistent, the restricted and liberal constructions being respectively pointed out in *Re Magann and Bonner* (1896), 28 O.R. 37, and *Moore v. Gillies* (1897), 28 O.R. 358. The proper interpretation would seem to be that if the tenant is able to shew that there is some question to be tried then a trial should be directed and a summary order refused, the procedure in fact being analogous to that on an application for summary judgment. It has been contended in the court below that the Judge of the county court has full power to decide questions of fact and that it is only when an important question of law arises that the summary jurisdiction should not be exercised but that certainly cannot be the test. It is probably more important to have a trial when questions of fact are involved than when a mere question of law however important is raised. Here very serious questions of fact are involved. There is a direct contest as to these alterations and to hold that the counterpart produced by the tenant is not binding is in effect to find the tenant guilty of forgery and perjury. The order therefore should be set aside and a trial directed.

George H. Watson, K.C., for the respondent was not called upon to argue.

The judgment of the Court was delivered by MEREDITH, C.J., at the conclusion of the argument:—We think that in this case no good purpose will be served by reserving judgment, as Mr. Blake has given us the benefit of a very full and clear argument as well as a reference to the decided cases that are necessary to be considered in coming to a conclusion.

At the outset I may say that the position in which the Act now stands is very unfortunate, and the language of it has led to some difference of judicial opinion.

As I said in the course of the argument, it seems to me that, when by 58 Vict. ch. 13, sec. 23, the Overholding Tenants Act, R.S.O. 1887 ch. 144, was amended, and the powers of the county court were very much widened by striking out the words "colour of right," the draftsman omitted to observe that words

were to be found in sec. 5 which possibly should have no place in the Act after the change was made. The language of sec. 5 is that if after such hearing and examination it appears to the Judge that "the case is clearly one coming under the true intent and meaning of sec. 3 of this Act." As the Act originally stood it required that the Judge should be clearly satisfied not only that there was a wrongful refusal to go out but that the claim to remain had no colour of right for its foundation.

We are not, however, I think, entitled to disregard those words. They remain in the statute, and we must endeavour to reconcile them as well as the words to which Mr. Blake has referred at the end of sec. 6, "in order that the question of right, if any appears, may be tried as in ordinary actions for the recovery of land" with the intention of the Legislature to enlarge, as indicated by the striking out of the words "colour of right", the powers of the county court under the Act.

We think that a not unreasonable view to take is this: That upon an application when the proceedings are removed, under sec. 6, it is open to the Court in reviewing the decision of the Judge of the county court to say that upon the facts or upon the law the case was not a clear one of a wrongful holding over by the tenant. In other words, that the question for the Judge is, when the evidence is concluded, "Is this a clear case upon the facts and the law?" If it is, it seems to me that all the language of the statute is satisfied and it is the duty of the Judge then to exercise the summary power conferred upon him by it; but if his conclusion is that it is a doubtful case, either upon the law or the facts, then he should withhold his hand, because he cannot say it has been clearly made to appear, and leave the parties to proceed by the ordinary course of law to determine the matters in dispute between them.

Then, as I say, it is open to the Court, in reviewing the opinion of the Judge, if the proper conclusion is that the case is not clearly made out either upon the facts or the law, that the tenancy has been terminated and that there is a wrongful holding over, under sec. 6, to discharge the order and leave the parties to proceed in the course of ordinary litigation.

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Now, in this case I think it is impossible to say that there is any doubt upon the facts. I do not think it is necessary to come to the conclusion that either forgery or perjury has been committed, as has been suggested in the course of the argument. All that has happened in regard to the counterpart of the lease which was produced by the tenant as the real document, entered into between the parties, and the condition of that document, may be quite consistent with the lease having been handed to the solicitor for the purpose of having some changes made in it at the instance of the tenant; the solicitor, having made those changes, not having noticed that the document was executed, and the tenant having forgotten all about it and not having taken the document to the landlord and procured his assent to the changes that were made. The evidence on the other side is that the document was executed as it stands; one part is produced from the custody of the landlord bearing the signature of the tenant making it a three years' lease.

It seems to me it is impossible to come to any other conclusion than that that was the document that was executed and was the one to evidence the rights intended to be given by the landlord in respect of the property. I think, therefore, that the Judge was right in coming to the conclusion that upon the facts of this case it was one coming clearly within sec. 3, and that the tenant was wrongfully holding over.

I think, therefore, that my brother McMahon was right in the conclusion to which he came. The decided cases are perhaps somewhat conflicting. *Moore v. Gillies*, 28 O.R. 358, decided by the King's Bench Division, is an express decision that the question to be tried is the right, and that case was followed by Mr. Justice Perdue, in a case referred to by my brother MacMahon, *Ryan v. Turner* (1904), 14 Man. L.R. 624; and I think we ought to follow those cases.

It is to be hoped some change will be made in the statute to get rid of the difficulty created by the provisions to which I have referred. If it is not the intention of the Legislature that this wide power should be given to the Judge of the county court, it would be better to make it clear upon the face

of the statute; if it is, some of the words which are there and have created embarrassment in the past ought to be stricken out.

We think that under all the circumstances, and in view of the state of the authorities, the proper course in dealing with the costs is to dismiss the appeal without costs.

I should have referred also to the latest case, *Re Grant and Robertson* (1904), 3 O.W.R. 846, where the Divisional Court, reviewing the statute, says the question of right may be tried under the Act.

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[IN THE COURT OF APPEAL.]

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TOWNSHIP OF FITZROY V. COUNTY OF CARLETON.

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April 12.

*Municipal Corporations—Highways and Bridges—Deviation—Consolidated
Municipal Act, 3 Edw. VII. ch. 19, sec. 617, sub-sec. 2.*

Held, Osler, J. A., dissenting, that the road in question was a boundary line road within the meaning of 3 Edw. VII. ch. 19, sec. 617, sub-sec. 2, notwithstanding its deviation for the purpose of avoiding the expense of building bridges across a river.

The history and meaning of the boundary line road legislation discussed. Judgment of Falconbridge, C.J.K.B., reversed in part.

AN appeal by the defendants from the judgment of Falconbridge, C.J.K.B., was argued before OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A., on the 12th and 13th of December, 1904.

Aylesworth, K.C., for the appellants the county of Renfrew.

J. A. Allan, for the appellants the county of Lanark.

Shepley, K.C., and *R. V. Sinclair*, for the respondents the township of Fitzroy.

D. H. McLean, for the respondents the county of Carleton.

The following statement of the facts is taken from the judgment of GARROW, J.A.:

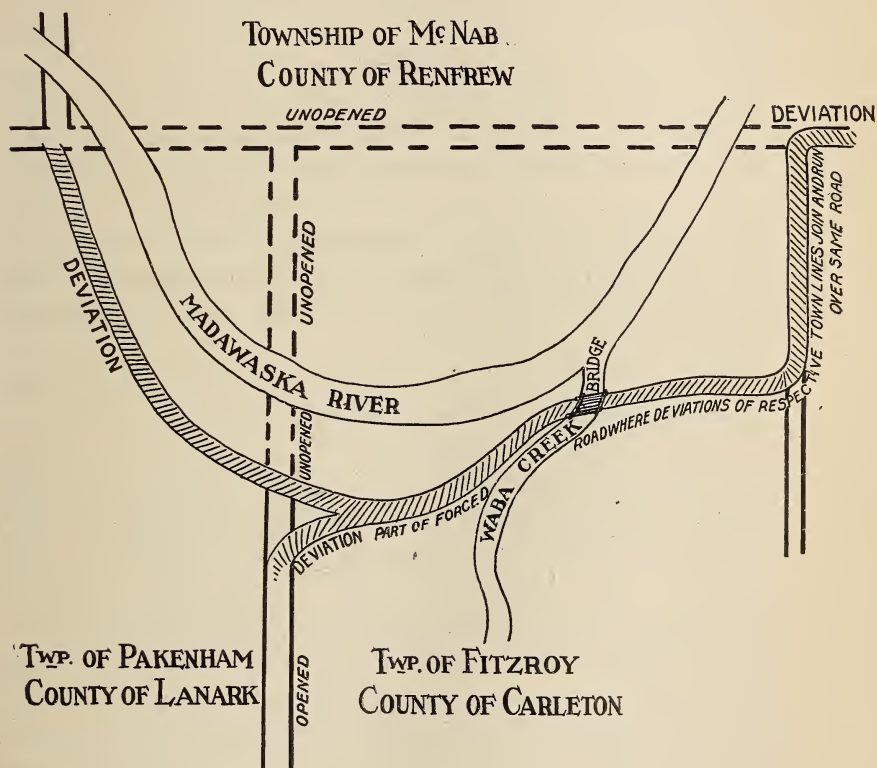
This is an appeal by the defendants the counties of Renfrew and Lanark against the judgment of Falconbridge, C.J., in favour of the plaintiffs, declaring certain highways to be deviation highways and directing the appointment of arbitrators to ascertain and decide the amount of the liability of the defendants for the proper care and maintenance of a bridge over a stream called the Waba which crosses the deviation road in the township of Fitzroy. The county of Carleton is also a party defendant but does not contest the plaintiffs' claim.

The physical facts are somewhat peculiar. No less than three township and the same number of county boundaries are involved in consequence of the difficulties in road construction caused by a sharp bend in the River Madawaska where these several boundaries meet. The township of Fitzroy is in the county of Carleton, the township of McNab in the county of

Renfrew and the township of Pakenham in the county of Lanark. The boundary line between Fitzroy and Pakenham runs northerly to the southerly limit of McNab which forms the northerly boundary to both Fitzroy and Pakenham at the place in question.

The river in its course towards the Ottawa River flows easterly in the township of McNab until about a mile westward from the junction of the boundary line between Pakenham and Fitzroy with that between these townships and McNab, when

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it sharply crosses the boundary between Pakenham and McNab, then proceeding easterly crosses the boundary between Pakenham and Fitzroy and again as sharply turns northerly and easterly and regains its original course through the county of Renfrew by crossing the boundary line between Fitzroy and McNab.

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It is therefore obvious that if the original boundary lines are to be opened no less than three expensive bridges in close proximity would be necessary, namely, one between the townships of Pakenham and Fitzroy, one between the townships of Pakenham and McNab and one between the townships of Fitzroy and McNab. None of the boundary lines in question has ever been opened throughout across this loop and none of these bridges has ever been built, although the neighbourhood has been settled for many years.

The present situation upon the ground is that the obstruction caused by the loop in the river is overcome by a highway built and maintained around the southerly side of the loop, commencing at the east in the boundary line between the townships of McNab and Fitzroy and ending in the west in the boundary line between the townships of McNab and Pakenham, this having been apparently the order of its construction, that is, from east to west. The boundary line road between the townships of Pakenham and Fitzroy was opened up at a later date and apparently ends when it joins the other first mentioned road.

The exact origin of the east and west road around the loop is not at all clear. There was in the early days a mill at or near the bridge in question over the Waba stream in the township of Fitzroy, and at least a portion of the road now in question, possibly all of it in the township of Fitzroy, owes its origin to the efforts of private individuals to reach this mill. And the other portion, namely that through the township of Pakenham around the bend had apparently a somewhat similar origin in that it too was originally a mere trespass road. Then the council of the township of Fitzroy passed a by-law to establish a road to the Pakenham boundary line in the line, if not upon the exact site, of the old trespass road and also of the present travelled road, on the 12th of December, 1853. And the council of the township of Pakenham passed a similar by-law to establish a road from that boundary line to the boundary line between Pakenham and McNab, also upon or near the site of the older trespass road, on the 1st of November, 1854, thus completing the loop around the bend and giving a continuous highway from east to west. Before the latter

by-law was passed, namely, on the 22nd of September, 1854, the township of Fitzroy had apparently passed or attempted to pass a by-law to repeal the former by-law before mentioned. No reason appears for so doing, nor does it appear that any notices were given or other steps taken to make the repeal effective, and it is the fact that the road remained open and was continuously used by the public as a highway after the alleged repeal just as before; so that the alleged repeal or attempted repeal may, I think, be disregarded.

Such, then, appears to be the history of the highway in question; first, mere trespass roads, followed by municipal recognition, and by user by the public for a period approaching fifty years, while the original allowances for roads during all these years remained and still remain unopened and incapable of use as thoroughfares by reason of the absence of the bridges required to cross the river.

Upon this road around the bend, since the passing of the by-law before mentioned, the townships of Pakenham and Fitzroy have from time to time expended public money in repairs and improvements, and statute labour has been done upon this as upon the other highways in the vicinity.

About five years before the trial the two townships united in joint action at or near the boundary line to alter and somewhat shorten the road so as to avoid a gully and improve the road. And this is apparently the only joint action in evidence by any of the several municipalities interested from the beginning.

The learned Chief Justice found that the road around the loop or elbow before described is a deviation for the purpose of getting a good line of road; and that the departures to the north-west and north-east of the road forming the boundary between the townships of Fitzroy and Pakenham are also deviations for the same purpose, and that both deviations were made as substitutes for the possible roads on the respective boundary lines, and were made for the purpose of obtaining a good line of road in view of the obstructing course of the Madawaska River and of the comparatively enormous expense in the matter of bridge construction and otherwise, and adjudged the relief asked for by the plaintiffs against all the defendants.

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April 12. OSLER, J.A.:—This case appears to me to be one of considerable difficulty and I have not been able to satisfy myself that the township of Fitzroy has any right of action.

There is no ground for saying that the same road, according to the way in which it is approached, can be a deviation from roads on two distinct and separate boundary lines, running, as in this case, at right angles to each other. If the road in question is a deviation at all it must be either of a road on the boundary line between Carleton and Renfrew or of that on the boundary line between Renfrew and Lanark. It cannot be of both, so as to make two of the counties liable for a bridge over a river crossing it as a deviation from a road on the boundary line between them, and also one of these and a third county liable for the same bridge, treating the road as a deviation from a road on the boundary line between the two latter.

The Act (3 Edw. VII. ch. 19) provides, as I read sec. 617 (2)* only for the case of a road on the boundary line between two municipalities. These may be in the same county, in which case the bridge must be taken care of by that county; or in different counties and then the adjoining counties must do so. The boundary line between two or more counties referred to in sub-sec. (1) I understand to mean a boundary line between one

*617.—(1) It shall be the duty of the county councils to erect and maintain bridges over rivers, streams, ponds or lakes forming or crossing boundary lines between any two municipalities (other than a city or separated town) within the county; and in case of a bridge over a river, stream, pond or lake forming or crossing a boundary line between two or more counties or a county, city or separated town, such bridge shall be erected and maintained by the councils of the counties or county, city and separated town respectively; and in case the councils fail to agree as to the respective portions of the expense to be borne by the municipalities interested, it shall be the duty of each to appoint arbitrators as provided by this Act, to determine the proportionate amount to be paid by each, and the award made by them shall be final.

(2) A road which lies wholly or partly between two municipalities shall be regarded as a boundary line within the meaning of this section, although such road may deviate so that it is in some place or places wholly within one of the municipalities, provided that such deviation is only for the purpose of getting a good line of road, and a bridge built over a river, stream, pond or lake crossing such road where it deviates as aforesaid shall be held to be a bridge over a river, stream, pond or lake crossing a boundary line within the meaning of this section.

county or union of counties and another county or union of counties.

The argument that the road to the north-east through the township of Fitzroy to the boundary line between that township and the township of McNab, which is also the boundary line between the counties of Carleton and Renfrew, cannot be regarded as a deviation from the road on the boundary line between Fitzroy and the township of Pakenham which is also the boundary between the counties of Carleton and Lanark, because it never strikes or enters this latter boundary line again, seems to me to apply quite as forcibly to regarding the same road as a deviation to the south-west from the road on the line between Fitzroy and McNab, which is also the county boundary between Carleton and Renfrew since it does not again enter that boundary line either but terminates at the line between Carleton and Lanark. It is only because at that place the road through Fitzroy connects with the road to the north-west through Pakenham in the county of Lanark that the former can be regarded as a deviation from the road on the boundary line between the county of Renfrew on the one side and the county of Carleton and county of Renfrew on the other. But this is not a boundary line between two *or more* counties within the meaning of sec. 617 (1). It is the boundary line between Carleton and Renfrew, and the boundary line between Lanark and Renfrew respectively where those counties adjoin each other, and the road of which the road through Fitzroy is said to be a deviation, is the road on the boundary line between the two former counties. Otherwise Lanark, or any other county to the east abutting on the road running east and west, might be liable to contribute to the cost of a bridge over the Madawaska River where that river crosses the boundary between Carleton and Renfrew, if it should ever be thought proper or become necessary to construct one there, or, *vice versa*, Carleton for the cost of a bridge over the same river where it crosses the boundary between Renfrew and Lanark.

It is upon that view, as I understand, that my learned brothers think that in the present case liability is cast upon the counties of Carleton and Renfrew alone, the road through Fitzroy being regarded as a deviation from the road on the

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boundary line between those two counties. If that were not so, the two roads through Fitzroy to the east and Pakenham to the west being regarded as a single deviation from the road between Renfrew on the north and Carleton and Lanark on the south, all three counties should be liable for a bridge over a river crossing any part of the deviation. I think all three counties are liable, or none of them, but if, as I agree, Lanark is not liable because the road through Pakenham is not part of the road through Fitzroy, that road being no part of a deviation from a road on the boundary line between Renfrew and Lanark, so neither is Renfrew liable, because the road through Fitzroy terminates at the county line between Carleton and Lanark and is therefore no part of a deviation from a road on the boundary line between Carleton and Renfrew, nor does it become such merely because of the fact that it connects with another road between one of those counties and a third. The county of Carleton, of course, cannot be liable alone because the road through Fitzroy has never been assumed by it and it is not a road lying between two municipalities in that county. I think that the origin and history of the so-called deviation roads cannot be disregarded, and from these it appears that they were not constructed for the purpose of getting a good line of road in substitution for that on the boundary line, which, it seems to me, is what the Act points at as the governing consideration for determining the liability of the counties. They were constructed in each case for a special purpose, and unless and until assumed by the respective counties of Carleton and Lanark, must be maintained, in respect of bridges thereon or otherwise, by the townships in which they happen to be.

I think the case is one not provided for by the Act, and therefore the appeals both of Lanark and Renfrew should be allowed and the action dismissed.

MACLENNAN, J.A.:—The law applicable to this case must be the Municipal Act of 1903, 3 Edw. VII. ch. 19, which was passed before this action was commenced. The proviso contained in sec. 617, sub-sec. 2, "Provided that such deviation is only for the purpose of getting a good line of road," must also

be applicable. This is made clear by sec. 759, excluding the application of sec. 758 (1) and (2).

Then, first, how does the matter stand between the counties of Carleton and Renfrew? What sec. 617 says is, that in case of a bridge over a stream crossing a boundary line between two counties, such bridge shall be erected and maintained by the councils of the counties, and if they fail to agree they shall arbitrate as to the proportion of expense. Sub-section 2 then declares that a road which lies wholly or partly between two municipalities shall be regarded as a boundary within the meaning of the section, although it may deviate so as to be in some place wholly within one of them, provided that such deviation is only for the purpose of getting a good line of road, and a bridge built over a stream crossing such road where it deviates shall be held to be a bridge over a stream crossing a boundary line within the section.

The road on which the bridge in question stands, instead of following the boundary from the north-east to the south-west, between Renfrew and Carleton, deviates therefrom, first southerly and then westerly, for about 1,500 yards, wholly within the county of Carleton, passes into Renfrew, and finally reaches and rejoins the original boundary or allowance, at a further distance of about 1,500 yards. The bridge is 1,000 yards from the county of Lanark and about 300 yards from the boundary line. The boundary line opposite to this deviation has never been opened throughout, owing to its being crossed twice by the Madawaska River, and the necessity for the construction of two bridges at very great expense. It is plain, therefore, that this road having regard to its relation to the boundary line, and to the purpose which it has served for many years, and apart from its origin, and from the proviso contained in sub-sec. 2, is a deviation of the boundary line. It is said that it was originally opened as a road to a saw-mill, which was erected where the bridge now stands. However that may be, it has for more than fifty years been a public highway, established by by-law of the county of Carleton, and by the expenditure of public money and statute labour thereon.

The formidable difficulty is the proviso in the statute of 1903. Is it a deviation only for the purpose of getting a good

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line of road? Words evidently copied from the judgment of Robinson, C.J., in *In re Brant and Waterloo* (1860), 19 U.C.R. 450, at p. 457. What is a good line of road? I should say it must be serviceable, convenient, easy of construction and repair. This road possesses these qualities. Then it is a *deviation*, a line chosen in preference to some other line, and so involving comparison with the original line. The deviation must be owing to some obstacle presented by the other line. Can it be doubted that the *raison d'être* of this deviation, begun more than half a century ago, when the inhabitants were few and poor, and maintained to this day, without any attempt, or even proposal, to erect the two expensive bridges required to open the boundary, was only for the purpose of getting a good line of road, that is a line serviceable, convenient, easy of construction and repair, and which avoids very expensive obstacles? I think that cannot be doubted. Nor is it immaterial that the proviso uses the word *is*, and not *was*, apparently intending that the present condition of the deviation, and not its past history or origin, is to be regarded, and the getting of a good line of road seems *now* to be the sole purpose of this deviation. The original allowance for obvious reasons is not a good line of road, and therefore this line is used instead.

Upon the whole, therefore, I think the judgment is right so far as the county of Renfrew is concerned.

At first sight there appears to be considerable force in the view adopted by the learned Chief Justice that just as this road, starting on the boundary road between Renfrew and Carleton and running south-westerly, is an obvious deviation from that boundary road, so may and must it be regarded as a deviation from the boundary road between Lanark and Carleton running northerly, diverging as it does from that and going north-easterly to avoid the Madawaska River, where it crosses that boundary road. But a deviating road must plainly come back, and have been intended to come back, at some point in its course, to or at all events near to the original road deviated from. The line in question does not, and could not, come back and rejoin or come near to the line between Lanark and Carleton from which, according to the hypothesis, it is a deviation or a divergence. I therefore think, with great

respect, that the judgment is wrong in holding the bridge to be a bridge on a stream crossing a road forming a boundary line between Carleton and Lanark.

I think the appeal of Lanark must be allowed, that the appeal of Renfrew must be dismissed, and that the mandamus should go against Renfrew alone.

GARROW, J.A.:—I am with deference unable to agree with the finding against the defendants the county of Lanark, which of course entirely depends upon whether under the circumstances the highway where crossed by the Wawa in the township of Fitzroy forms in law part of the boundary line road between that township and Pakenham. The evidence is undisputed that when the boundary line road between these townships was opened it was so opened only along the true boundary line, until it reached the already existing travelled road around the bend, where it stopped, as I think it might properly have done, without the consequences following which are contended for by the plaintiffs.

With reference to the other branch of the case, I agree with the conclusion reached by the learned Chief Justice. The merits lie entirely in that direction and the law is not, I think, subjected to any undue strain in so holding. Section 617, sub-sec. 1, of the Municipal Act, 1903, prescribes the alleged duty, and sub-sec. 2 declares that "a road which lies wholly or partly between two municipalities shall be regarded as a boundary line within the meaning of this section, although such road may deviate so that it is in some place or places wholly within one of the municipalities, provided that such deviation is only for the purpose of getting a good line of road, and a bridge built over a river, stream, pond or lake crossing such road where it deviates as aforesaid, shall be held to be a bridge over a river, stream, pond or lake crossing a boundary line within the meaning of this section."

The recent amendment, 3 Edw. VII. ch. 18, sec. 131, has apparently only declared in statutory form that which had been long ago held by the Courts to be the proper construction of the statute: *In re Brant and Waterloo*, 19 U.C.R. 450;

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County of Victoria v. County of Peterborough (1888), 15 A.R. 617; and does not, in my opinion, affect the questions involved in this action. The appellants' main contentions as I understand them, are (1) that to constitute a deviation road there must be joint action by the local municipalities charged with the duty of opening up and maintaining the original allowance of road, in originating the deviation; and (2) that a road which has its origin in some other motive than to obtain a good line of road cannot legally be or become a deviation road as that term is used in the Municipal Act.

When the road in question was first opened township boundary lines, forming also county boundary lines, were under the exclusive jurisdiction of county councils. See 12 Vict. ch. 81, secs. 39 and 41, sub-sec. 11; and C.S.U.C., ch. 54, sec. 339. And undoubtedly if no road at all had been opened joint action would have been necessary in the manner pointed out in the Municipal Act, which has, I think, from the beginning always contained the requisite machinery in case of disagreement to compel joint action where there was a joint duty. But this is the case of a highway already opened and in long and well established use, and the real question in my opinion is not so much as to its actual origin as to its use by the public. Nor is it denied that in fact the road serves the purpose of connecting, and is in fact the only means on the ground of connecting, the highways which have been opened to the east and to the west of it upon the true boundary line. And it is equally beyond question that the river is a very serious obstacle to opening up the true boundary line, quite sufficient to justify a deviation. Section 617, sub-sec. 2, mentions expressly a "road," not a road allowance, and this would, I think, include a road the public title to which had been acquired by dedication, or even whose legal origin was unknown, or if known was proved to have been for some temporary or merely local purpose, providing it had finally become a public highway and had in fact been adopted and accepted by the municipalities interested and been used and was being used as a deviation of the original road allowance for the purpose of acquiring a good line of road: see *In re McBride and York* (1871), 31 U.C.R. 355; *O'Connor v.*

Otonabee (1874), 35 U.C.R. 73, at p. 85, where the same very learned Judge who decided the case of *In re McBride and York* (the late Sir Adam Wilson) used this language: "A county council may accept a road as dedicated by a private person, although there was no by-law signifying such acceptance;" he having previously said in *In re McBride and York*, which was a case of dedication of a deviation road between two townships, "It is not necessary that the road between townships should consist of original road allowance only. Such roads may be acquired or may be added to by purchase or by dedication, as in other cases, and when once established by any lawful means it is a road for all purposes, and subject to the common incidents and law applicable to highways in the particular locality in which they are situated."

The question is really one of fact. The municipal corporations are charged with the duty to open up and maintain highways for the convenience of the public. The duty in the present case was jointly vested in the counties of Carleton and Renfrew, and neither of them as corporations apparently did anything, but they both knew, that is the inhabitants knew, from the beginning that this road was being opened, and that it was gradually as the years passed assuming its final character of an apparent deviation road to avoid the river. They could have intercepted this by opening up the true boundary line or some other road in lieu of it, but they preferred, wisely I think, to do nothing, because the road now in question satisfactorily served the public purpose and so absolved them from their duty in the premises.

Must there not come a time when it is no longer a question of origin in such a case? I certainly think there must, and that that time is long past in the case of the present highway which was in my opinion long ago accepted and adopted by the municipalities interested as in fact a boundary line road, although not upon the true boundary line, and a boundary line road so accepted and adopted by them for the purpose only of obtaining a better line of road than upon the true boundary line.

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With deference I think there was no good reason shewn for ordering the county of Renfrew to pay the costs of the county of Carleton. The judgment against the latter county should under the circumstances be without costs, and they should pay their own costs of the appeal, their appearance having been unnecessary as they do not contest the plaintiffs' claim.

The appeal of the county of Lanark should be allowed with costs and the action as against them dismissed with costs. And the appeal of the defendants the county of Renfrew should be dismissed with costs, and the judgment appealed from should be varied accordingly.

MACLAREN, J.A.:—I agree with the judgment just read.

R. S. C.

[DIVISIONAL COURT.]

LOUNT V. LONDON MUTUAL FIRE INSURANCE COMPANY.

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June 10.

*Fire Insurance—Variations from Statutory Conditions—Notice to Agent—
R.S.O. 1897, ch. 203, sec. 168, clauses 3 and 23.*

A variation from the fire statutory conditions striking out from the third condition the words "or its local agent" in the clause requiring notice of a change material to the risk to be given to "the company or its local agent", and providing that wherever the words "agent" or "authorized agent" occur in the statutory conditions such agent or authorized agent shall be held to mean the company's secretary only, was, in the case of a company having its head office in the Province of Ontario and more than four hundred local agents in the Province, held, as to the third statutory condition, to be just and reasonable, and notice to a local agent insufficient.

Judgment of STREET, J., *ante* p. 549, affirmed.

APPEAL by the plaintiff from the judgment at the trial, reported *ante* p. 549.

The action was brought to recover the sum of six hundred dollars under a policy of insurance issued by the defendants in favour of the plaintiff. The policy in question purported to cover the machinery, belting, gearing and shafting in a building situated in the village of Whitevale, represented in the application as "used as a brush and handle factory—water power only," and there was a warranty in the application that the statements in it were correct.

The statutory conditions were printed on the back of the policy in plain type and in black ink. Following them and printed in red ink in the same style of type were certain variations, with the clause required by the statute as to these variations being in force only so far as they might be held to be just and reasonable: R.S.O. 1897 ch. 203, sec. 168.

The statutory conditions specially in question in the action were numbers 3 and 23, which are as follows:—"3. Any change material to the risk, and within the control or knowledge of the assured, shall avoid the policy as to the part affected thereby, unless the change is promptly notified in writing to the company or its local agent; and the company when so notified may return the premium for the unexpired period and cancel the policy, or may demand in writing an additional premium, which the

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assured shall, if he desires the continuance of the policy, forthwith pay to the company; and if he neglects to make such payment forthwith after receiving such demand, the policy shall be no longer in force.

23. Any written notice to a company for any purpose of the statutory conditions, where the mode thereof is not expressly provided, may be by letter delivered at the head office of the company in Ontario, or by registered post letter addressed to the company, its manager or agent, at such head office, or by such written notice given in any other manner to an authorized agent of the company."

The variation relied on by the defendants was in the following terms:—"3. The words 'or its local agent' in the 3rd statutory condition are struck out, and wherever the words 'agent' or 'authorized agent' occur elsewhere in the said statutory conditions such 'agent' or 'authorized agent' shall be held to mean the company's secretary only."

The application for the insurance in question was made to the local agent of the company at Whitby, which is twelve miles from Whitevale, and when the policy was issued it was sent to this agent, who delivered it to the plaintiff.

In June, 1904, the dam of the factory in question was washed away, and in July an engine and boiler were put in the factory, and thereafter the machinery was run by steam power up to the time of the fire in question, which occurred on the 29th of September, 1904.

The defendants refused to pay the loss on the ground that there had been a change material to the risk by substituting steam power for water power, and that notice to the company of the change had not been given.

Before the engine was put in the building the plaintiff's agent and manager sent to the local agent of the company at Whitby a post-card telling him that it was the intention of the plaintiff to substitute temporarily steam power for water power in the factory. A threshing machine engine was obtained, but after being tried for a few days was found to be insufficient for the purpose, and then an engine of forty-horse power and a boiler, which was bricked in in the factory building, were procured. The agent at Whitby received the post-card but did not

forward it to the company or notify the company of its receipt by him, and he stated that he wrote to the plaintiff's agent advising him to notify the company of the intended change, but no further notice was sent either to the company or to the agent.

It was shown that the premium on the risk with water as the motor power was five per cent., and evidence was given that the change made was most material to the risk, and that the premium with steam power would have been from seven to eight per cent. It was also shown that the defendants had more than four hundred local agents in the Province of Ontario. There was evidence that the engine had not been in use for some hours before the fire occurred, and that the fire must have been caused in some other way.

The action was tried at Barrie on the 6th of February, 1905, before Street, J., who on the 27th of February, 1905, gave judgment in favour of the defendants.

The appeal was argued before a Divisional Court [MEREDITH, C.J.C.P., MACMAHON, and TEETZEL, JJ.] on the 17th of May, 1905.

A. E. H. Creswicke, for the appellant. Unless the variation in the conditions is binding upon the plaintiff, the right to recover is clear. It is not disputed that notice was given to the local agent, and it is submitted that this is all that is required. There is evidence that the fire could not have occurred from the use of the engine in question, and that being so, it should be held that the substitution of steam power for water power was not, in this particular instance at all events, a change material to the risk. Assuming, however, that there was a change material to the risk, sufficient notice of the change has been given. The variation in question is not a just and reasonable one. *Prima facie* any variation is unreasonable, and must in every instance be very closely scrutinized: *Dominion Grange Mutual Fire Association v. Bradt* (1895), 25 S.C.R. 154; *Merchants' Fire Insurance Co. v. Equity Fire Insurance Co.* (1905), 9 O.L.R. 241; *May v. Standard Fire Insurance Co.* (1880), 5 A.R. 605. The agent who takes the application, and from

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whom the policy is received, is the one who should be dealt with in all questions relating to the insurance, and it would be imposing an unfair burden upon the person insured to make it necessary for him to communicate at all times with the head office of the company instead of with the local agent. To communicate information to the local agent is the ordinary and usual mode, and no restriction on this right should be given effect to by the Court: *McKay v. Norwich Union Insurance Co.* (1895), 27 O.R. 251; *Ballagh v. Royal Mutual Fire Insurance Co.* (1880), 5 A.R. 94; *Smith v. City of London Fire Insurance Co.* (1887), 14 A.R. 328; *McQueen v. Phoenix Mutual Fire Insurance Co.* (1880), 4 S.C.R. 660; *Mutchmor v. Waterloo Mutual Fire Insurance Co.* (1902), 4 O.L.R. 606. The effect of the 23rd condition has also to be considered. Its wording emphasizes the view that as to questions under the 3rd condition the local agent may be dealt with. Even if such a variation could under any circumstance be given effect to as just and reasonable, it cannot be supported in the present case, because it has not been printed in such a way as to comply with the provisions of the Act. There ought to be a difference in the type as well as a difference in the colour between the statutory conditions and the variations: *Sands v. Standard Fire Insurance Co.* (1879), 27 Gr. 167.

J. C. Judd, for the respondents, was called on to argue only the question of the reasonableness of the variation relied on. There is nothing unreasonable in the variation in question, the head office of the defendant company being in Ontario, and the company having over four hundred local agents in the Province. It would be most unjust and unreasonable to hold the company bound by notice given to any one of these numerous agents over whom the company has very little control, and who might not in many instances send forward to the company the information received by them. A variation relied on must be construed according to the circumstances of each case. In the present instance it would have given the insured no more trouble to send notice to the head office than to send it to the agent at Whitby. It is impossible to contend that the change was not material to the risk, and the defendants ought to have been

given an opportunity to decide whether they would cancel the risk or not.

Creswicke, in reply,

June 10. MEREDITH, C.J.:—I with some hesitation agree with my brother MacMahon, whose judgment I have had an opportunity of reading.

MACMAHON, J.:—It was not seriously contended that the change was not material to the risk. But it was strenuously urged that the variation in the third statutory condition compelling the insured to give notice of the change to the company instead of to the local agent was not just or reasonable.

In *May v. Standard Fire Insurance Co.*, 5 A.R. 605, at p. 622, Patterson, J.A., said—"Conditions dealing with the same subjects as those given by the statute, and being variations of the statutory conditions, whether they are classed upon the policy as variations or as additional conditions, should be carefully scrutinized. They should, in my opinion, be tried by the standard afforded by the statute, and held not to be just or reasonable if they impose upon the insured terms more stringent, or onerous, or complicated than those attached by the statute to the same subject or incident." See also the judgment of Osler, J.A., in *Smith v. City of London Fire Insurance Co.*, 14 A.R. 328, at p. 337, and the judgment of Street, J., in *McKay v. Norwich Union Insurance Co.*, 27 O.R. 251, at p. 261.

The 23rd statutory condition provides that: "Any written notice to a company for any purpose of the statutory conditions where the mode thereof is not expressly provided, may be by letter delivered at the head office of the company in Ontario, or by registered post letter addressed to the company, its manager or agent, at such head office, or by such written notice given in any other manner to an authorized agent of the company."

The agent of the defendants at Whitby was not a general agent, but merely a local agent of the company, of which it had between 400 and 500.

The variation in the third statutory condition requiring the notification of a change to be given to the secretary of the company does not impose upon the insured a term more onerous

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or stringent than that which is imposed by the third statutory condition, which requires a notification in writing to the company or its local agent. The notice was posted at Whitevale, addressed to the local agent at Whitby, and to send the notice to the address of the company—which is endorsed on the policy—would not be more onerous than sending it to Whitby, and cannot be considered either unjust or unreasonable.

I agree with the conclusion arrived at by the learned trial Judge that the variation to the third statutory condition was just and reasonable, and, as no notice in writing was given by the plaintiff to the company of what has been found to be a material alteration in the risk, there can be no recovery on the policy.

The appeal must be dismissed with costs.

TEETZEL, J.:—I am of the same opinion.

R. S. C

[MACMAHON, J.]

HARKNESS V. HARKNESS.

1905

June 16.

Will—Construction—Vesting—Life Estate—Remainder—"Family."

A testator provided that his son A. and his daughter M. should have, after the death of his wife if she should survive him, the life use of all his real and personal property to hold to them jointly during their natural lives if they should survive him, and to the longest liver of them; and that after the death of his wife, and his son A., and his daughter M., all real property belonging to him should be divided into three equal portions and distributed as follows, one portion to his son J.'s family, one portion to his son G.'s family, and one portion to his daughter Margaret's family :—

Held, that the word "family" meant and included only the children of the two sons and the daughter and that these children took among themselves per capita, and that the estates of the children became on the death of the testator vested estates in remainder subject to the respective life estates of the wife, the son A., and the daughter M.

ACTION tried at Stratford on the 6th of June, 1905.

R. T. Harding, for the plaintiff.

J. P. Mabee, K.C., for the defendant George Harkness.

G. G. McPherson, K.C., for the other defendants.

June 16. MACMAHON, J.:—The statement of claim asks for the construction of the will of George Harkness the elder, of the township of Downie, in the county of Perth, and the plaintiff desires a sale of the lands mentioned in the said will.

The plaintiff is one of the beneficiaries under the will of the deceased.

The defendant George Harkness is a son of the deceased and is the sole surviving executor under the will and is now residing in Zion City, in the State of Illinois.

The testator, George Harkness the elder, died on the 25th of June, 1872, having made his last will dated the 16th of June, 1870, devising the following real estate, namely: the west half of lot 13 in the 8th concession of the township of Downie, containing 50 acres more or less, valued at \$2,500, as follows: "I will that my son Archibald and my daughter Mary have (after the death of my wife if she survives me) the life use of all my real and personal property to hold to them jointly during their natural lives if they survive me, and to the longest liver of them."

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"4. I will that after the death of my wife and my son Archibald and my daughter Mary, that all real property belonging to me shall be divided into three equal portions and distributed as follows: one portion to my son James' family, one portion to my son George's family, and one portion to my daughter Margaret's family."

The testator's widow died on the 24th of July, 1884. The son Archibald died on the 7th of July, 1892, and Mary, the last life tenant, died on the 25th of February, 1905.

Probate was granted to the defendant George Harkness on the 6th of June, 1902.

I am asked to consider whether the word "family" in the fourth clause of the will means the children of the testator's respective sons James and George and of the testator's daughter Margaret, or if it has a wider signification.

In *Barnes v. Patch* (1803), 8 Ves. 604, a question arose under a disposition by the will of Joseph Jefferson, who devised his "estate" to his two illegitimate children, and in case of their death before becoming of age then the estate was "to be equally divided between brother Lancelot's and sister Esther's families."

The two natural children died before attaining twenty-one.

A bill was filed by the children of Esther Barnes (the testator's sister) to have the will established, the legacies paid, and the residue distributed among the plaintiffs and the children of Lancelot Jefferson *per capita*, viz., in eighteen shares.

Sir William Grant, M.R., held that the word "estate" in a will unless qualified passes both real and personal estate; and that under the disposition to the families of Lancelot and Esther the children were entitled exclusive of their parents and *per capita*.

In *Pigg v. Clarke* (1876), 3 Ch. D. 672, where by his will the testator (after directing the payment of his debts, etc.), gave all the remaining interest in his real and personal property to his wife during life, "and after her decease then to be equally divided amongst all my said family that shall be then living when they shall attain the age of twenty-one years," Jessel, M.R., said that while the word "family" has various meanings, its primary meaning is "children," and he held that the children

of the testator could alone take under the words "my said family."

See also *In re Hutchinson and Tenant* (1878), 8 Ch. D. 540.

I consider that the children of the testator's sons James and George and of his daughter Margaret alone take *per capita*.

Then as to the question whether the interests of the children of such sons and daughter became vested on the death of the testator.

In Jarman on Wills, 5th ed., p. 757, the author says: "Where a testator devises lands to A for life, and after his decease to B in fee, the respective estates of A and B (between whom the entire fee simple is parcelled out) are both vested at the instant of the death of the testator, the only difference between the devisees being that the estate of the one is in possession, and that of the other is in remainder."

So in *Town v. Borden* (1882), 1 O.R. 327, where a testator by his will gave to his wife the use of his personal property and of his farm and buildings for her support and the bringing up of his children "and at her decease the whole of the personal and real property to be equally divided between my six children," it was held that the shares of the children vested on the death of the testator.

The same principle prevails in the law of Scotland: *Taylor v. Graham* (1878), 3 App. Cas. 1287; *Hickling v. Fair*, [1899] A.C. 15.

It is clear the estates of the children of the testator's sons James and George and of his daughter Margaret became on the death of the testator vested estates in remainder subject to the respective life estates of the widow and of the testator's son Archibald and his daughter Mary.

All parties agreed that partition was impracticable, and there will be an order for a sale of the real estate with a reference to the Master at Stratford.

The costs of all parties will be paid out of the estate, those of the executor as between solicitor and client.

R.S.C.

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[IN CHAMBERS.]

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IN RE SOLICITORS, CLARK V. LEE.

April 19.

Solicitor and Client—Maintenance—Conducting Case Gratuitously.

A solicitor brought an action on his bill of costs in connection with certain litigation carried on by him on the defendant's behalf, and on motion for summary judgment the defendant alleged that the solicitor took up the ease on the condition that he was to get his costs out of the defendants thereto, and that if the litigation failed all the defendant would have to pay was the costs of the other side:—

Held, that the agreement alleged was not champertous, nor did it come within the prohibition against maintenance.

A solicitor may conduct a case out of charity from friendship towards his client.

THIS was an motion to consolidate two actions under the following circumstances:

The plaintiff sued on a bill of costs incurred in an action brought by him as solicitor for the now defendant.

That action was dismissed by the trial Judge. His decision was reversed by the Court of Appeal, and a further appeal to the Supreme Court was quashed.

The taxed costs were paid to the now plaintiff. They amounted to \$1264.73. The defendant Lee had also paid \$126, and gave a note for \$82.50, making in all \$1473.23.

At the end of the litigation plaintiff rendered a bill for \$1755.89. He gave credit for the above \$1473.23. This left a balance of \$282.66. For this as well as for the \$82.50 note which was not paid, the present action was brought.

The bill was rendered more than a year ago and no order for taxation was taken out because negotiations were pending for settlement, as was said.

On March 2nd Lee commenced an action in the county court to recover back from the plaintiff Clark \$173.00, being moneys received by Clark to the use of Lee. Clark appeared and then on March 13th commenced this action in the High Court of Justice to recover \$370.33.

In this latter action Lee appeared.

Thereupon Clark moved to consolidate the action in the county court with that in the High Court of Justice and asked for summary judgment with reference of his bill for taxation.

The motion for summary judgment was based on the fact that the bill had been rendered more than a year ago and was therefore *prima facie* admitted, as no order had been taken out for taxation.

Lee made affidavit that Clark through pressure and pending the appeal to the Supreme Court induced him to give a mortgage for \$1,000 on the representation that if that appeal were successful there would in some way be something left for him out of the wreck, through the mortgage.

The client Lee also denied that he ever consciously signed a retainer; and further alleged that "Clark took up the case on condition that he was to get his costs out of the defendants; that if we failed all I would have to pay was the defendants' costs. It was on this understanding that he went into it."

The motion was argued on April 4th, 1905, before Mr. Cartwright, Master in Chambers.

C. A. Moss, for the plaintiff.

J. E. Cook, for the defendant.

The authorities cited are stated in the judgment.

April 19. THE MASTER IN CHAMBERS [after stating the facts as above]:—Mr. Moss argued that the agreement set up by Lee could not be heard as a defence to plaintiff's action because it was champertous and savoured of maintenance. He cited Anson on Contracts, 10th ed., p. 216, and other authorities set out in his memorandum.

With this contention I am unable to agree. The agreement alleged is certainly not champertous. Nor do I think it in any way comes within the prohibition against maintenance.

Anson adopts the definition of maintenance given by Lord Abinger, C. B., in *Findon v. Parker* (1843), 11 M. & W. 675, at p. 682, viz.: "Where a man improperly for the purpose of stirring up litigation and strife, encourages others to bring actions, or to make defences which they have no right to make."

This received the emphatic approval of Lord Blackburn in

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Hutley v. Hutley (1873), L.R. 8 Q.B. 112; and of Lord Coleridge, C.J., in *Bradlaugh v. Newdegate* (1883), 11 Q.B.D. 1, at p. 12.

In Cordery on Solicitors, 2nd ed., p. 232, it is said: "It was never doubted that a solicitor might lay out his own moneys as disbursements on his client's account, and a solicitor can conduct a case gratuitously out of charity or friendship toward his client."

He gives as his authority for the latter part of his proposition what is said in Viner's Abr. Maintenance, M. 12: "An attorney may present his client's cause without fees, and yet it is not maintenance."

This seems decisive of the right of a client to avail himself of such an agreement, as is set up in the present case, if he can prove it.

Whether he can do so or not, is a matter to be disposed of elsewhere, and not on a motion under Con. Rule 603.

The client having been sued by his solicitor; is entitled as of right to have this issue investigated in the usual way by a Judge who will try it with or without a jury as he may think best.

The proper order to make is to dismiss the motion for judgment, and consolidate the actions.

The defendant is to be at liberty to set up all questions as to the agreement, and also to counterclaim, if so advised, for a release of the \$1,000 mortgage. In this way all matters in dispute between the client and his former solicitor will be before the Court and be disposed of in one action as directed by the Judicature Act.

As to what constitutes champerty, see R.S.O. 1897, vol. 3, ch. 327.

A. H. F. L.

[DIVISIONAL COURT.]

HILLYER v. THE WILKINSON PLOUGH CO.

D. C.

1905

May 11.

Trial—Questions to Jury—Answers of Jury—Accident to Workman—Negligence.

New trial ordered in an action by a workman against his employer, for personal injuries sustained through carelessness of a fellow workman, because, although the jury found negligence imputable to the defendants and had stated in what that negligence consisted, they were not asked to and did not find whether such negligence was the cause of the plaintiff's injuries; nor when asked whether the defendant through its foreman was guilty of negligence, and if so in what such negligence consisted, were they explicitly directed to confine their findings to such negligence, if any, as, upon the evidence, they should be satisfied had caused the explosion which injured plaintiff.

THIS was an appeal by the defendants from the judgment of Teetzel, J., in this action, brought under the circumstances stated in the judgment; and was argued on April 18th and 20th, 1905, before MEREDITH, C.J.C.P., FALCONBRIDGE, C.J.K.B., and ANGLIN, J.

E. E. A. DuVernet, for the defendants.

R. Mackay, for the plaintiff.

The following were referred to on the argument: *Alexander v. Miles* (1904), 7 O.L.R. 103; *Anderson v. Mikado Mining Co.* (1902), 3 O.L.R. 581; *Senior v. Ward* (1859) 1 E. & E. 385.

MAY 11. ANGLIN, J.:—The defendants appeal from the judgment of Teetzel, J., upon findings of a jury awarding the plaintiff \$500 as damages for personal injuries sustained by the plaintiff, who was severely burned by the liquid metal cast upon him as the result of an explosion caused by a wet sprue being thrown by a fellow workman into a ladle filled with molten iron. The following are the questions submitted to the jury, and their answers thereto:—

“1. Was the defendant, through its foreman, guilty of negligence? A. Yes.

“2. If so, in what did such negligence consist? A. In carelessness of foreman placing wet sprues where workmen could use them.

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"3. Could the plaintiff by the exercise of reasonable care have avoided the injury? A. No.

"4. Did the plaintiff fully appreciate the danger he was in and voluntarily assume the risk of injury? A. No.

"5. If the plaintiff should be entitled to recover damages at what sum do you assess such damages? A. \$500."

The use of wet sprues in order to dull molten metal is admittedly highly dangerous. There was evidence sufficient to justify the submission of this case to a jury, and to sustain their findings. The only question, in my opinion, is whether these findings are conclusive.

Although the jury have found negligence imputable to the defendants, and have stated in what that negligence consisted, they were not asked to and did not find whether such negligence was the cause of the plaintiff's injuries. Had the jury been explicitly directed to confine their findings upon the first and second questions submitted, to such negligence, if any, as, upon the evidence, they should be satisfied had caused the explosion which injured the plaintiff, the actual answers given by them might have been sufficient to support the judgment in appeal. But a careful study of the learned Judge's charge does not enable me to say that such direction was given. In its absence the finding of negligence is not conclusive in the plaintiff's favour and a new trial will therefore be necessary. It is to be regretted that counsel did not call the attention of the learned trial Judge to the omission of a question which would elicit from the jury a specific determination as to the causal connection between the negligence found and the injuries sustained by the plaintiff. This was a duty incumbent upon the counsel for both parties. While, therefore, the judgment of my brother Teetzel must be vacated and a new trial ordered, neither party should have costs of the abortive trial or of this appeal.

A. H. F. L.

[IN CHAMBERS.]

CLIPSHAW V. THE TOWN OF ORILLIA.

1905

May 17.

Appeal—Leave to Appeal to Court of Appeal—Appeal from Divisional Court—Judicature Act, 1904, sec. 76 (1) (g)—Trivial Amount at Stake—Special Reason.

Held, on application by the plaintiff for leave to appeal to the Court of Appeal from the judgment of a Divisional Court, under sec. 76 (1) (g) of 4 Edward VII. ch. 11—whereby such leave may be given (in cases other than those in which under that section the appeal lies as of right) where there are special reasons for treating the case as exceptional and allowing a further appeal—that the amount at stake being very small (\$75), the fact that the decision on the facts or the law might be thought controvertible was not by itself special reason for treating the case as exceptional and allowing a further appeal.

MOTION by the plaintiff for leave to appeal from the judgment of the Divisional Court, 5 O.W.R. 298, reversing the judgment of Anglin J., at the trial, 4 O.W.R. 121.

The motion was argued before OSLER, J.A., in Chambers, on May 6th, 1905.

F. E. Hodgins, K.C., for the plaintiff.

E. F. B. Johnston, K.C., for the defendant.

May 17. OSLER, J.A.:—I think leave to appeal should not be granted. The judgment is for \$75 only, and could not be increased even were the proposed appeal to be successful. The question is whether there are special reasons for treating the case as exceptional and allowing a further appeal: 4 Edw. VII., ch. 11, sec. 76 (1) (g).

It is said that actions are pending at the suit of other persons arising out of the facts on which the plaintiff relies to maintain this action. It does not, however, appear, nor indeed was it asserted, that these actions were to abide the event of this action. In them the facts may be more fully brought out and further evidence given in support of the contention that the defendants were in fact maintaining the temporary dam which caused, as is said, the injuries of which the plaintiff complains, or that it was maintained on the defendant's property after

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notice to them to remove it, or that it was or was not a necessary part of the works which the defendants were authorized to construct and which they took over from their contractor. The questions on which the judgment of the Divisional Court is founded are very much, if not altogether, questions of fact. It is contended that the Court took a wrong view of these facts upon the evidence, but where the amount involved is so trifling I doubt if that can be regarded as a special reason for treating the case as exceptional and allowing further litigation; at all events, in the absence of more clear indication of mistake or error in dealing with the evidence as a whole, or unless it is plausibly shewn that on no reasonable view of the case ought the Court to have arrived at the conclusion complained of upon the facts as presented. So too, as regards the questions of law. The motive of every appeal is, or ought to be, that the decision complained of is wrong in law upon the facts proved or which ought to be taken to be proved. Yet it is now an accepted principle that, in many cases, *interest reipublicæ* litigation should cease at some stage short of the ultimate general court of appeal even though the decision in the particular instance may be open to doubt. I do not say that it is so in this case. I only say that where the amount at stake is very small the fact that the decision, either on the facts or the law, may be thought controvertible is not by itself a special reason for treating the case as exceptional and allowing a further appeal.

The case of *Attorney-General v. Tod-Heatley*, [1897] 1 Ch. 560, referred to by Mr. Hodgins, was the case of a prosecution at the suit of the Crown for the abatement of a nuisance and is not opposed to the authorities cited by the Chancellor, in the last paragraph of his judgment, as to what is necessary in the case of an action at the suit of a private person against one on whose land a nuisance created by a former owner is continued.

The motion for leave to appeal must therefore be dismissed with costs.

A. H. F. L.

[IN THE COURT OF APPEAL.]

THE TRUSTS AND GUARANTEE COMPANY V. ROSS.

Sale of Goods—Agreement for—Statute of Frauds—Sale of Business as a Going Concern—Depletion of Stock.

C. A.

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Tenders having been advertised for by the plaintiffs, for the purchase, as a going concern, of a grocery and hardware business at so much on the dollar for the stock and fixtures, and for a sum to be specified for the good will, and stating that the stock sheets and conditions of sale were with plaintiffs' solicitors where they might be seen, the defendant, on seeing the advertisement, inspected the stock lists, and, according to the solicitors' statement which the plaintiff denied, authorized him to write out and sign the defendant's name to a tender offering 75c. and 50c. respectively for the grocery and hardware stocks, but making no offer for the good will. This offer was accepted by the plaintiffs and notice thereof in writing given by the solicitor to the defendant containing a request to call and execute the agreement in accordance with conditions of sale, and to make his deposit. This the defendant refused to do by letter, repudiating any liability on the contract. The conditions of sale were never produced or proved, while a large quantity of staple goods had been sold prior to time for completion of the contract:—

Held, that no valid contract under the Statute of Frauds was established; and further, that by the depletion of the stock, the plaintiffs were not in a position to carry out the alleged contract.

Judgment of MACMAHON, J., at the trial reversed.

THIS was an appeal from the judgment at the trial in favour of the plaintiffs for \$677.82, the amount alleged to have been due on a breach of contract to purchase a stock of goods.

The action was tried before MACMAHON, J., without a jury at St. Catharines, on April 20, 1904.

George Lynch-Staunton, K.C., for plaintiffs.

J. H. Ingersoll and *C. Kingston*, for defendants.

The learned Judge reserved his decision and subsequently delivered the following judgment:

April 27, 1904. MACMAHON, J.:—The plaintiffs are the executors of the will of the late John McCalla, who carried on a jobbing grocery and hardware business in the city of St. Catharines, and they caused an advertisement to be inserted in the newspapers in that city on the 3rd September, 1902, asking for tenders for the stocks.

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The advertisement stated that the business was being continued as a going concern by the executors, and that the stock sheets could be seen at the office of the executors in Toronto, and at the office of Mr. Marquis, the solicitor for the executors, at St. Catharines.

I find that the defendant,—who had been in the jobbing grocery business for a number of years, and was conversant with the class of goods being offered for sale,—visited the McCalla store and inspected the grocery stock, but says he made no thorough examination of it. As the stock amounted to only about \$4,500, it would not take him long to determine its value. He saw Mr. Marquis, the solicitor for the executors, on the evening of the day he made the inspection (Sept. 21), and says he spoke about tendering, but denies having given any authority to Mr. Marquis to make any offer on his behalf for the stock. I think he must have forgotten what he said to Mr. Marquis, because subsequent events shew that he considered himself bound by the offer which I find he instructed Mr. Marquis to make. The offer he made was 75 cents for the groceries and 50 cents for the hardware stock. We are not concerned with the hardware now, because that has been disposed of.

The defendant, I say, must have forgotten what he instructed Mr. Marquis to do because on the day following the one appointed for the receipt for tenders,—which would be the 23rd September,—he was notified that his offer had been accepted, and he went to see Mr. Festing, who had long been connected with the McCalla business, and had tendered for the stock. Mr. Festing says the defendant offered to sell him the stock at 80 cents on the dollar. He afterwards told Festing that Mr. Marquis wanted to see him. Festing saw Mr. Marquis who said he was authorized by the defendant to offer the stock to him (Festing) for 80 cents on the dollar. The defendant assumed to be the owner of the stock, and was endeavouring to dispose of it, which shews conclusively that he had made what he then considered a binding offer to the plaintiffs. There are other circumstances, such as his asking Festing if he would remain in the business with him, and he made a like offer to Miss Fisher, the bookkeeper; and he also spoke to John Morrison, an em-

ployee of the late Mr. McCalla, asking him what his wages were, and if he was willing to remain on.

It would be idle, after all that, for the defendant to urge that he had not through Mr. Marquis made an offer for and had not become the purchaser of this stock.

The stock list shews that there was \$4,444 worth of groceries in the warehouse. There was between the 22nd August, when the stock list was made up, and the 22nd September, when the tenders were to be in, a turning over of the stock to the extent of \$3,107.56, and as the grocery stock on hand when it eventually passed into the hands of Festing amounted to \$3,081.64, it shews that the stock had been fairly replenished from time to time in order to keep the business on as a going concern.

What was urged by the defendant's counsel was that the staples that were there when the defendant made an examination of the stock list had so diminished that the stock that was there on the 24th September was not the stock as set out in the stock list when tenders were asked for.

There is no doubt that some of the staples had materially lessened in quantity. The tobaccos had been lessened to the extent of \$215; the soaps by \$143; the gem jars to the extent of \$157.47; and the teas by \$146.38.

Mr. Festing pointed out that he had made a mistake in regard to the sugars. He erroneously carried down an amount of \$479.19 from the top of one of the pages of the stock sheet, and the reduction in the value of the sugars would, with that sum brought down, have been \$648; but when that was rectified by deducting the \$479.19 so erroneously brought down, it shewed that the sugars on hand when the stock list was completed amounted to only \$183.87. The defendant when he inspected the stock said that he saw a few barrels of sugar in the warehouse, which coincides with the stock list.

Before endorsing the record I will consider the question as to whether the state of the stock on the 23rd September, when he was notified of the acceptance of his offer, was so different from what the stock was when he made the tender and saw the stock list, as to prevent the plaintiffs from recovering.

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According to Miss Fisher's statement, the value of the stock on the 4th October when Festing bought was \$3,081.64. The amount to which plaintiffs would be entitled at twenty-two cents on the dollar is \$677.82.

I have since considered the point reserved. The defendant was aware that after the stock list had been completed the business was being continued as a going concern pending a sale, and tendered with that knowledge. The executors meanwhile purchased supplies of staple and other goods to enable the business to be advantageously carried on, so as to keep it as a going concern, and I do not consider the stock of staples had been reduced to a greater extent than other classes of goods had been during the period between stock taking and the date when the defendant put in his tender.

Mr. Marquis was not a party to the contract, but a third person authorized by the defendant to sign on his behalf the offer to purchase, and therefore this case does not come within *Sharman v. Brandt* (1871), L.R. 6 Q.B. 720, cited by Mr. Ingersoll.

There will be judgment for the plaintiffs for \$677.82.

From this judgment the defendant appealed to the Court of Appeal.

On February 6, 1905, the appeal was heard before MOSS, C.J.O., OSLER, MACLENNAN, GARROW and MACLAREN, JJ.A.

E. E. A. DuVernet and *C. Kingston*, for the appellants. No contract was proved between the parties. The defendant denies that he ever authorized Marquis to act for him and put in an offer. Where, as here, an agent claims to act for both vendor and purchaser the strictest proof is required, and there being a conflict of evidence, the evidence of Marquis should have been corroborated. Moreover, it was never intended that what took place was to constitute the contract, but that a formal document should be drawn up. The plaintiffs' acceptance of the defendant's alleged tender was a qualified acceptance only as it was subject to the conditions of sale, and if the defendant's offer was also subject to such conditions, the plaintiffs failed to prove them, which it was their duty to do: *Chin-*

noek v. Marchioness of Ely (1865), 4 DeG. J. & S. 638. There was, therefore, no sufficient memorandum of a contract to satisfy the Statute of Frauds, and no acceptance or receipt of the stock by the defendant, nor any payment to take the case out of the statute: *Nicholson v. Bower* (1858), 1 E. & E. 172. Even if the defendant authorized Marquis to sign a written tender as his agent, he being the agent of the plaintiff could not also be agent for the defendant to sign the contract under the statute: *Sharman v. Brandt*, L.R. 6 Q.B. 720; Blackburn on Sales, 2nd ed., p. 73; *Vale of Neith Cutlery Co. v. Furness* (1876), 45 L.J.N.S. Ch. 276; Pollock on Contracts, 7th ed., p. 163; Leake on Contracts, 4th ed., p. 180. The plaintiffs also were not ready and willing to deliver the goods which were to be the subject of the sale. They had so depleted the staple goods as to be unable to make delivery as agreed.

G. Lynch-Staunton, K.C., and *A. W. Marquis* for the respondents. What took place between Marquis and the defendant clearly shews that the defendant authorized Marquis to make the offer for him. Then as to the Statute of Frauds, the contract was a valid one under the statute. First there is the advertisement describing the subject matter; then the offer referring to the advertisement, the acceptance of the offer, and the notification to the defendant of the acceptance. The advertisement is clearly identified by the fact of the envelope containing the offer being endorsed "Tender McCalla's Estate," and more than this, there is the letter of the defendant's solicitor refusing to carry out the contract, but which, at the same time, may be looked at as a recognition of the contract. *Freeman v. Freeman* (1891), 7 Times L.R. 431; *Long v. Millar* (1879), 4 C.P.D. 450; *Pearce v. Gardiner*, [1897] 1 Q.B. 688. Then as to the goods, the defendant was entitled to claim under the contract. The sale was of the business as a going concern, and the defendant, who had been in the business himself, was fully aware of the fact that sales were made every day and that before the completion of the contract a quantity of the goods would be sold. He was buying at so much on the dollar on the goods that he should receive, and therefore as what should be sold would be deducted from the price he had to pay he sustained no damage:

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April 4. The judgment of the Court was delivered by OSLER, J.A.:—This was an action for breach of contract to purchase a grocery and hardware stock belonging to the plaintiffs.

On the refusal of the defendant to carry out his alleged contract the plaintiffs sold the grocery stock at a loss and claimed the difference between the price the defendant agreed to pay for it and that which they were afterwards obliged to sell it for.

The defendant denied that there was any contract in fact, or any contract in writing to satisfy the Statute of Frauds.

He also defended on the ground that the plaintiffs were not ready and willing or able to deliver the goods they had offered to sell, having sold to other persons a substantial part thereof before their acceptance of the defendant's alleged offer.

At the trial it appeared that plaintiffs were the executors of one John McCalla who had carried on a general grocery and hardware business in St. Catharines. They advertised for tenders for the purchase *en bloc* of the grocery and hardware stock, goodwill, fixtures, etc., of the business. The advertisement stated, *inter alia*, that intending purchasers were to tender at a rate of so much in the \$ for the stock and fixtures and a specified sum for the good will; that the business had been continued from McCalla's death by the executors, and was a going concern; that the stock sheets might be seen on application to the executors' solicitor, and that further particulars and conditions of sale might also be seen there.

Mr. A. W. Marquis was solicitor for the executors. He stated that after the publication of the advertisement the defendant came into the office on two occasions and looked over the stock sheets; that on the 22nd Sept., 1902, the day before the tenders were to be opened, the defendant met him on the street in the evening and said he thought he would make a tender on the stock; that he asked the defendant to come into his office and write it. The defendant asked the witness to write it out for him and give him the figures, 75 cents for the grocery stock and 50 cents for the hardware stock; nothing for the goodwill. Witness said, "Then I will write that tender out and sign your name, *per* myself." This the defendant assented to and instructed him to do so. The witness accordingly wrote and sent to the plaintiffs the following:

"To the Trusts and Guarantee Co. (L'td.), Toronto :

Dear Sirs,—I offer 75c. on the \$ for the grocery stock and 50c. on the \$ for the hardware, but nothing for the goodwill.

Yours, John Ross *per* A. W. Marquis.

And on the 24th Sept. having heard from the plaintiffs accepting the offer, he wrote the defendant, "John Ross, Esq., city. Dear Sir,—*Re* McCalla Estate. Your tender for the McCalla stock was accepted by the Trusts and Guarantee Co., L'td. Please call and execute an agreement in accordance with the conditions of sale and make your deposit. Yours, A.W.Marquis."

The conditions of sale referred to in this letter and in the advertisement were not produced or proved.

In the meantime the plaintiffs had continued to sell and dispose of the goods in the shop as they had been previously doing. On the 1st Oct., 1902, the plaintiffs wrote the defendant expressing their surprise that he had not executed the agreement, and notified him that they would hold him responsible for any loss they might sustain if they were obliged to dispose of the stock in another way. And on 3rd Oct. the defendant's solicitors in answer to that letter wrote saying that defendant had decided not to enter into "the agreement" and repudiated any liability for "the transaction;" that the goods were not as represented and that a great many of the staple articles such as tobacco and sugar were sold thus depreciating the value of the stock offered for sale.

The defendant said he had seen the advertisement and examined the stock sheets. He admitted that he had met Marquis on the street and spoken of the sale, and that he had said he would give him 50 and 75 provided that the deal was straight, *i.e.*, alluding to the stock sheets, and that the staple goods such as tea, tobacco and sugar were there, but that he had never authorized Marquis to put in a written tender for him.

It appeared that a substantial quantity of the staple goods, specified in the stock sheets, had been sold off in carrying on the business, and had not been replaced.

I am of opinion that on both the objections taken the defendant is entitled to succeed. The plaintiffs are obliged to

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concede that the conditions of sale referred to in the advertisement and in their agent's letter of the 24th September were part of the contract they rely upon, and that the defendant's offer was upon the terms of and subject to those conditions, as otherwise the acceptance contained in that letter not being an unqualified acceptance of the defendant's offer, proof of a contract would fail for that reason.

And on the other hand if the offer was subject to such conditions they have not been proved and the written evidence of a contract fails in that direction also.

It is plain from the only allusion to the conditions in the evidence that they were of importance in regard to the other objection to the plaintiffs' right to recover, namely, that they were not ready and willing or able to deliver the goods which the defendant's verbal or written tender referred to.

The advertisement invited tenders at so much in the \$ on the stock as shewn by the stock sheets. That stock had been as regards several items substantially depleted and not replaced at the date of the offer. It by no means follows from the fact that the advertisement refers to the business as having been continued from McCalla's death as a going concern, that the stock sheets on which tenders were invited and made were not those which shewed the actual condition of the stock at the time of the offer, and one would expect to find that this was so as the advertisement called for tenders at a rate of so much in the \$ on the sheets of which inspection was invited. It was essential for the plaintiffs to prove clearly that the defendant had entered into a contract which entitled them to insist that he was bound to take just what was in the shop, though it might be less than what was scheduled in the stock sheets. It may be that the conditions would have shewn this, but it does appear from the evidence that in that case the defendant would not have got what he supposed, and, I think, rightly supposed, he was buying.

With all respect, I think the appeal should be allowed, and the action dismissed with costs.

G. F. H.

[IN THE COURT OF APPEAL.]

JONES V. GRAND TRUNK RAILWAY COMPANY.

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April 12.

Railways—Second-class Passenger—Accommodation—Smoking Car.

A railway passenger holding a second-class ticket is entitled to reasonable accommodation of the kind usually furnished to passengers of that class and cannot be compelled to travel in a smoking car.

Judgment of BRITTON, J., affirmed, OSLER, and GARROW, JJ.A., dissenting as to the conclusions of fact.

APPEAL by the defendants from the judgment at the trial.

The plaintiff, who was the wife of an Indian of the Mississauga Band, residing at Hagersville, brought the action to establish an alleged right to travel over the defendants' line of railway at half fare under the terms of an agreement entered into between the Indians and the Great Western Railway Company, predecessors in title of the defendants.

The plaintiff had been in the habit of travelling over the defendants' line of railway between Hamilton and Hagersville and the defendants had for a long time sold to Indians first-class tickets at one-half fare. A short time before the occurrence in question, however, the defendants changed their practice in this respect and began to issue to Indians special tickets called "Indian tickets," which were sold at half of the first-class fare but purported on their face to be second-class tickets, half the first-class fare not being the same, however, as second-class fare.

On the 18th of May, 1903, the plaintiff purchased one of these tickets from Hamilton to Hagersville, and, as she had been accustomed to do, went into a first-class car. The conductor pointed out to her that the ticket was a second-class ticket, and said that she could not remain in the first-class car unless she paid the difference between the second-class fare and the first-class fare, and he insisted that if she would not do this she must travel in what he said was a second-class car.

After some discussion the plaintiff refused either to pay the increased fare or to enter the car in question, which was, she said, a smoking car, and she was compelled to leave the train at Rymal.

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The action was tried before Britton, J., and a jury. The plaintiff's evidence was that she had asked for an "Indian ticket" and that she had not been told of the change in the practice and did not notice that the ticket was marked "second-class." Certain questions were submitted to the jury and the effect of their findings was that even if the plaintiff were only a second-class passenger the car to which she was asked to go was not sufficient for her accommodation, on account of its being a smoking car, and they assessed the damages at \$10. The learned Judge gave judgment, on the 3rd of June, 1904, holding that the alleged agreement between the Indians and the Great Western Railway Company was not made out and that the plaintiff had no right to travel as a first-class passenger at half fare. There was no appeal as to this branch of the case. On the other branch of the case the learned Judge held that the question of sufficient accommodation was one of fact and that upon the whole evidence and the answers of the jury the plaintiff was entitled to judgment and he accordingly gave judgment in her favour for the damages assessed and for costs on the High Court scale: see 3 O.W.R. 705.

The appeal was argued before MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A., on the 24th and 25th of January, 1905.

W. R. Riddell, K.C., for the appellants. The main branch of the case has been disposed of in the defendants' favour and the question now involved depends upon the construction of sec. 246 of the Railway Act, 51 Vict. ch. 29 (D.). It provides that sufficient accommodation shall be furnished for the transportation of passengers. This section is taken from a New York statute and the meaning of it is explained in *Wibert v. New York & Erie R.W. Co.* (1855), 12 N.Y. 245; and *Bissell v. New York Central R.W. Co.* (1862), 25 N.Y. 442, at p. 452. It does not carry the duty any further than at common law except in the direction of providing carrying capacity. At common law a carrier was not bound to provide space. He was bound only to give equal facilities for those desiring to use such space and means as were available. The statute makes it

necessary for the railway company to have space available for all passengers who wish to use the trains but it does not impose any liability as to the nature of the accommodation to be furnished. There is therefore, it is submitted, no liability under the statute in this case, even if the car in question is held to be a smoking car: *Chesapeake, etc. R.W. Co. v. Wells* (1887), 4 S.W. Rep. 5. Nor is there any liability at common law. The sole duty at common law is to carry safely but not necessarily in special comfort: Hutchinson, 2nd. ed. secs. 495 to 505; Browne on Carriers, ch. 11, p. 366; Chitty on Contracts, 14th ed., p. 395; Chitty on Carriers, Am. ed., pp. 338 to 341; *Pennsylvania R.W. Co. v. Roy* (1880), 102 U.S. 451, at p. 457; *Butler v. Manchester, Sheffield and Lincolnshire R.W. Co.* (1888), 21 Q.B.D. 207; *Readhead v. Midland R.W. Co.* (1869), L.R. 4 Q.B. 379. In many of the States a special duty is imposed on railways as to the kind of cars to be provided for the different classes of passengers, and the American cases must therefore be read with caution. In the absence of special provisions the passenger's right at the highest is to ask for accommodation of the character generally used for passengers of the class in question: Schouler on Carriers, 3rd ed., secs. 627, 8; Hutchinson, 2nd ed., secs. 542, 3; 4 Elliott on Railroads, secs. 1585 to 1587. The evidence is clear that although smoking was going on in part of the car in question, it was, in fact, a second-class car and quite fit for use by passengers. There is nothing to justify the view taken by the learned Judge in the Court below, that some notice should have been given by the defendants that they did not intend to issue to Indians first-class tickets at half fare. Each ticket sold evidenced a specific contract and the plaintiff was bound by the terms of the contract she entered into. Having a second-class ticket, she had no right to travel in a first-class car. *Dyson v. London and North-Western R.W. Co.* (1881), 7 Q.B.D. 32, at p. 36; *Gillingham v. Walker* (1881), 44 L.T.N.S. 715; *Bentham v. Hoyle* (1878), 3 Q.B.D. 289. A question of the sufficiency of accommodation is not one which should be left to the decision of a jury. It would be impossible for railway companies to know up to what standard they must bring the cars used by them in order to accord with the views

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and fancies of the jury before whom a complaint may be brought for consideration.

A. G. Chisholm, for the respondent. The question involved in the appeal is really a very simple one and it is not necessary to deal in detail with the very elaborate argument on behalf of the appellants. The statute is plain in its terms. Sufficient accommodation must be furnished, and that certainly means that the railway company are bound to use reasonable care and diligence in providing for the safety and comfort of the passengers, and it is a question for the jury whether such care and diligence were used or not. It is plain that on the evidence the jury was entitled to come to the conclusion that the car into which the plaintiff was asked to go was a smoking car. It has been held in *Blain v. Canadian Pacific R.W. Co.* (1903), 5 O.L.R. 334, that a railway company are bound to take reasonable means to prevent one passenger from assaulting another and there is really in principle no difference between an actual assault and the puffing of tobacco smoke in the face of a fellow passenger. In view too of the long continued practice to issue first-class tickets to Indians at half fare, there should have been some special warning given to the plaintiff: *Lake Shore and Michigan Southern R.W. Co. v. Greenwood* (1875), 79 Pa. St. 373; *Richardson v. Rowntree*, [1894] A.C. 217. The plaintiff did not pay second-class fare and did not know that she had purchased a second-class ticket, and she is entitled to damages for the annoyance and humiliation of being wrongfully forced to leave the train.

Riddell, in reply.

April 12. Moss, C.J.O.:—I am of opinion that the judgment entered for the plaintiff should not be disturbed.

In coming to this conclusion I deal with the case as it was dealt with below, upon its own facts.

The plaintiff had frequently travelled upon the defendants' train between Hagersville and Hamilton and *vice versa* as the holder of an Indian ticket occupying a seat in the first-class carriage even when the train was composed, as it was on the occasion in question, of two carriages, one a first-class carriage and the other the carriage in respect of which the dispute has

now arisen. Until the occasion in question she had always occupied a seat in the first-class carriage and had never been denied the accommodation. Upon the weight of evidence the other carriage was to all outward appearance nothing more than a smoking car. There was nothing to indicate that it was a car for the accommodation of second-class passengers. The conductor testified that the words "second-class" were painted on the outside but in this he is contradicted by the brakesman and the plaintiff's husband, who made a careful examination of the carriage. Inside the word "smoking" is painted on one end, if not on both ends, but there is a small square or card of paper posted over the door of the smaller compartment with the words "no smoking" printed with a pen and ink. The testimony shows that every part of the carriage was on occasions occupied and used by smokers of tobacco. The conductor says he only checked smoking in the smaller compartment when women were there, and admits that at times it was an offensive carriage by reason of tobacco smoke. The plaintiff says that on the occasion in question when she alighted on the platform at Rymal she saw a number of persons at the windows smoking with their pipes in their mouths. The jury found that the carriage was in fact a smoking car, and it was open to them to so find upon the evidence.

Upon the findings and the evidence it should, I think, be taken to be established, (1) that the carriage into which the conductor told the defendant to go bore to all outward appearance the semblance of a smoking car, and nothing else; (2) that the plaintiff believed in good faith that it was a smoking car and nothing else; (3) that there was no other carriage provided as part of the train for the accommodation of second-class passengers; (4) that the plaintiff was told by the conductor that she must pay the full first-class passenger fare or go into "the next car," meaning the carriage in question, or get off; (5) that the conductor was aware that the defendant believed the carriage to be a smoking car and nothing else, but he did not inform her to the contrary or give her any reason to think otherwise; (6) that a smoking car used as such is not sufficient accommodation for the transportation of second-class passengers.

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Upon these conclusions it follows that upon the occasion in question the defendants did not furnish sufficient accommodation for the plaintiff as a second-class passenger. I see nothing improper or fraught with the dire consequences suggested by counsel for the defendants in the finding of the jury that as a smoking car the carriage in question was not sufficient accommodation for second-class passengers. The light in which Parliament regards the practice of smoking tobacco in railway carriages is found in sec. 214, sub-sec. (e) of the Railway Act which authorizes railway companies to make by-laws, rules or regulations for "prohibiting the smoking of tobacco and the commission of any *other* nuisance in or upon such carriages." Even in the absence of rules or regulations no person travelling in a first-class carriage would be permitted to smoke in the midst of the other passengers. He would be obliged to conform to the ordinary usages and decencies. And surely there can be no license to a person to enter a car filled perhaps with women and children, and because they are travelling on second-class instead of first-class tickets and in a second-class carriage, subject them to the nuisance caused by tobacco smoke which would not be tolerated in the car he came from. There is no evidence in this case that it is the usage to allow smoking among the passengers in a second-class carriage.

If, as the defendants contended, there was a small compartment of the carriage in question not devoted to smoking, the plaintiff was not aware of it. As before mentioned there was nothing on the outside to indicate that it was a second-class passenger carriage, and all the indications the plaintiff observed pointed to its being a smoking car. I think it was the conductor's duty, seeing, as he must have seen, that the plaintiff was under that impression, to have told her of the compartment. The duty is to "furnish" sufficient accommodation, and I cannot think that duty was performed in this instance. To "furnish" must include giving or bringing to the notice of, those for whom the accommodation is provided, some intelligible direction to where it is. The plaintiff was allowed to continue under the belief that the only accommodation offered her was a seat in a smoking car, and in the view I take of the facts

and findings this was not furnishing her with sufficient accommodation.

The appeal should be dismissed with costs.

GARROW, J.A.:—The chief question, namely, whether the Indians had a right by contract for valuable consideration to a reduced rate over the defendants' railway was decided in the defendants' favour, and there is no appeal as to that.

The other question upon which the plaintiff succeeded depends upon the contract created by the ticket which the plaintiff purchased from the defendants, and on which she was riding when, as she says, she was removed from the car, and the only question which, in my opinion, we are called upon to determine is whether there was evidence from which the jury could reasonably have drawn the conclusions expressed in their answers.

The first question was apparently misunderstood by the jury. It reads: "If the plaintiff had a right to travel on the train from Hamilton to Hagersville on the 18th of May, 1903, as a first-class passenger what damages, if any, is the plaintiff entitled to by reason of being compelled to leave the train at Rymal?" And they answered: "Yes, she was entitled, and should get ten dollars damages." All that was left to them, apparently, was the question of damages, on the assumption that she was a first-class passenger. The second question is: "If the plaintiff was only a second-class passenger did the car to which the plaintiff was directed furnish accommodation reasonably sufficient for the transportation of the plaintiff as a passenger?" To which they answered "No." The third: "If not, in what respect was it insufficient in accommodation for the transportation of the plaintiff on the day in question?" To which they answered: "On account of it being a smoking car." And the fourth and final question is as to what, if any, damages she is entitled to on the finding that she was only a second-class passenger, and the car insufficient, and they replied: "That she get ten dollars."

Section 246 of the Railway Act provides that all regular trains shall furnish sufficient accommodation for the transportation of passengers; that such passengers shall be transported on the due payment of the fare lawfully payable therefor, and

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that every person aggrieved by any neglect or refusal in the premises shall have an action against the company.

There is, therefore, clearly a right of action in the plaintiff if on the occasion in question she was not supplied with sufficient accommodation for which she had paid the fare lawfully payable.

Prior to the year 1900 the defendants had been accustomed to sell to the plaintiff and other Indians tickets at reduced rates and permit them to ride in the first-class cars, but on the 1st of February, 1900, a new regulation was, apparently, adopted, authorizing the sale by the defendants' agents of tickets "to *bond fide* Indians only for second-class continuous passage only, at one-half ordinary one way first-class fare, for one way tickets."

The plaintiff applied for and obtained at half-fare, one of these "Indian" tickets, as they are called, to which as the wife of an Indian she, although a white woman, was entitled.

The ticket on its face expresses that it is an "Indian ticket," and to be used only in riding in a second-class car. Notwithstanding this the plaintiff took a seat in the first-class car, and refused to leave it or to pay the additional fare, and insisted on her right to remain there. The conductor told her that she was only entitled to second-class accommodation, and that the second-class car was the one next ahead, into which he asked her to go, but she refused and finally got off the train, no doubt under compulsion, as one of the three alternatives offered her by the conductor, to pay first-class fare, to go into the second-class car, or to get off, but without any actual force having been applied.

There were two passenger cars, one first-class and the other second-class. The second-class car had two compartments, one of which, the largest, was used as a smoker, but in the other smoking was prohibited by a notice posted up on the door, and there is absolutely no evidence or reasonable evidence that the plaintiff could not have ridden in this smaller compartment in reasonable and sufficient comfort and safety.

The conductor apparently acted with great consideration. He was clearly only desirous of doing his duty to his employers. He allowed plenty of time for consideration. The only thing which he omitted to do was to point out that the second-class

car had two compartments, although I think in the plaintiff's state of mind this would probably have made no difference.

This omission by the conductor, however, is not sufficient to render the defendants liable. They had performed their contract by placing a second-class car there ready to receive the plaintiff. If she had entered it instead of the first-class car which her printed ticket told her was not the right car, she would have found the two compartments, the smaller one without any smokers, and with the prohibition notice on the door. It is said she had no notice of the change of practice, and that she had a right to assume its continuance until she received some notice.

Her sole rights depend upon the contract and the statute. The parties are here standing on strict legal rights, and there is no authority for the statement that she was entitled to notice, as a matter of right.

But even if it could be held otherwise she had explicit notice from the conductor, and at least after that had no right to remain in the first-class car unless upon payment of the lawful fare for that class of accommodation, and was subject to removal to the proper car, or if she declined, as she did, then off the train entirely.

I think there was nothing for the jury to pass upon, and that the action should have been wholly dismissed with costs.

OSLER, J.A.:—I agree with the judgment of my brother Garrow.

MACLENNAN, and MACLAREN, JJ.A., concurred with Moss, C.J.O.

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[DIVISIONAL COURT.]

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PHILLIPS V. THE CORPORATION OF THE CITY OF BELLEVILLE.

Nov. 22.

Municipal Corporations—Trustees—Lands Acquired at Tax Sale—Sale of—Accepting Lower Tenders for—New Trial.

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A municipal corporation occupies, as regards corporate property, the position of a trustee, and is amenable to the like jurisdiction of the Courts as is exercised over trustees generally.

A number of lots, which had been acquired by the corporation of a city for arrears of taxes, were directed to be sold, and where offers should be less than the amount for which they had been acquired and the subsequent taxes, such offers were to be dealt with by a committee composed of the mayor, one of the aldermen and the treasurer. Against the protests of the mayor, the other two members of the committee accepted an offer for a less amount than the mayor stated could be obtained therefor from the plaintiff, and on the matter being brought before the council it was decided to ask for tenders. This was accordingly done, and tenders put in by the alleged purchaser and the plaintiff, the plaintiff's being the higher one, but, the council notwithstanding, rejected it, accepting the lower one:—

Held MEREDITH, J., dissenting that, under the circumstances, the alleged sale could not be supported, and that the sale should have been to the plaintiff; but if the corporation desired an opportunity of shewing any good reasons for their action in the matter there might be a further trial on that point.

THIS was an action brought by the plaintiff on behalf of himself and the other ratepayers of the city of Belleville for an injunction restraining the corporation from conveying certain lots of land to the defendant Caldwell. There was also a personal claim on his own behalf for a conveyance of the lots to him.

The action was tried before STREET, J., without a jury, at Belleville, on November 22nd, 1904.

E. D. Armour, K.C., and *W. N. Ponton*, for the plaintiff.

W. C. Mikel, for the corporation.

W. Jeffers Diamond, for the defendant Caldwell.

The facts were as follows:—The city of Belleville having a number of lots of land which had been acquired by the corporation for arrears of taxes, on 22nd February, 1904, passed a by-law which, after reciting that the corporation had become the purchaser of the lands and premises at various tax sales at different times, and that it was desirable that the corporation should sell the same, enacted that the city solicitor should have power to sell all the lands, not having buildings or other improve-

ments erected thereon, of which the corporation had become the purchasers thereof under or pursuant to or as the result of any tax sale, for a price or sum not less than the amount for which the corporation became the purchasers thereof, together with any subsequent taxes accrued thereon; and the mayor and treasurer were thereby authorized to assign and transfer any certificate or certificates relating thereto, and to execute any deed or deeds thereof upon payment of the said price; and the clerk was authorized to affix the corporate seal thereto; but that when the price offered for any of the said lots should be less than the amount for which the same was purchased by the city, the mayor and chairman of the executive committee of the council for the time being, together with the treasurer, should be a committee to decide upon the advisability of accepting same; and when this committee accepted an offer it should be so certified upon the deed of conveyance thereof by the signatures of the members of the committee.

There were fifty-eight lots in all which were offered for sale.

On March the 8th, 1904, an offer was received from the plaintiff of \$150 for the fifty-eight lots, but this was not entertained. On March 12th an offer was received from the defendant Caldwell of \$150, for nine of the lots, which was accepted and the lots sold to him. On the 14th another offer was received from the defendant Caldwell of \$50 for five more of the lots. This offer was also accepted and the lots sold to him. This left forty-four of the lots unsold. On the 18th the defendant Caldwell offered \$125 for the forty-four lots and shortly afterwards the plaintiff offered \$150 for the lots, but neither of these offers was entertained. On the 23rd the plaintiff made an offer of \$150 for the whole of the fifty-eight lots, but this not having been made until after the sale of the lots already referred to, nothing was done about it. On the 24th the defendant Caldwell offered \$200 for the forty-four lots, but this offer was not entertained. The plaintiff was informed by the mayor of this offer, and he made an offer of \$210 for the forty-four lots, but no action was taken upon it. Nothing more was done until the 25th April when the mayor received an offer from the plaintiff of \$30 for three of the lots. An offer of \$265 for the forty-four lots was, as it subsequently appeared, received by alderman

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Panther, the chairman of the executive committee. The special committee met, when the mayor submitted the plaintiff's offer of \$30 for the three lots which he asked the committee to accept, and that the question of the sale of the remaining forty-one lots should be left open. Alderman Panther intimated that they had an offer for the whole of the lots from the defendant Caldwell, but his offer was not submitted to the committee. At the instance of alderman Panther and the treasurer the defendant Caldwell was telephoned for, and when he arrived alderman Panther and the treasurer wanted him to allow his offer, the amount of which was not stated, to stand for the balance of the lots, after excluding the three lots for which the plaintiff had made his offer. The mayor objected to so dealing with the matter; he said that they should sell the three lots to the plaintiff; that the plaintiff had said that from the way they had treated him he thought they did not want to do business with him; that the plaintiff would give more than any one else for the lots, but if they sold him the three lots, he would make an offer for the balance. The defendant Caldwell at first would not consent to his offer being changed, but finally appeared willing to do so.

Alderman Panther then went out of the room into another room and called the defendant Caldwell to follow him, which he did, and was joined by the treasurer, when they discussed the matter privately, the mayor remaining alone in the committee room. The defendant came back and asked for a cheque; and subsequently they all returned to the committee room. The mayor said he did not approve of this manner of doing business. Alderman Panther then offered to show the mayor the defendant Caldwell's offer, but he said he did not wish to see it, as he said they had concluded the bargain without him and left the committee room. Alderman Panther said that his reason for not disclosing the offer was that the defendant Caldwell felt that his offers were being carried to the plaintiff so that he could offer a few dollars more. The others agreed to accept the defendant Caldwell's offer of \$265 for forty-one of the lots, and gave him a receipt therefor, and the following entry made by the treasurer was produced: "Accepted Phillip's offer by Mr. Caldwell allowing his offer to hold good for forty-one lots less

the \$30, or \$235, Caldwell's offer, the mayor dissenting. Receipt given for \$235." On the following day a special meeting of the council was called by the mayor when he reported what had taken place at the meeting of the special committee, when a resolution was passed that the solicitor and clerk, the clerk of the council being also the solicitor, be instructed to write both the plaintiff and the defendant Caldwell advising them that the special committee having charge of the sale of the lands in question would receive sealed offers for the lands, the offers to be in by Friday, April 29th, 1904, at noon, addressed to the solicitor and clerk; and the treasurer was instructed to return to the defendant Caldwell his cheque, as his offer to purchase the forty-one lots had not been accepted by the council. Letters were accordingly sent to the plaintiff and the defendant Caldwell advising them of the resolution of the council and asking for sealed offers, and the defendant Caldwell's cheque was returned to him.

On the same day the defendant Caldwell returned the cheque to the treasurer, stating in writing endorsed on the letter in which the cheque to him had been enclosed, that he refused to accept the return of the cheque.

On April 29th the plaintiff put in a written offer of \$326.50 for the forty-four lots and enclosed a marked cheque for that amount. The defendant Caldwell, by his solicitor, wrote the following letter, dated April 27th, and addressed to the solicitor and clerk of the council:—

"Dear Sir;—" Your letter addressed to Mr. Caldwell has been handed in *In re 44 Roberts' Estate Lots* advising him that a special meeting of the city council held yesterday decided that the special committee having charge of the sale of lands for taxes would receive sealed tenders for the forty-four lots purchased by the city for taxes in 1902, and said tenders to be given to you by Friday noon. Mr. Caldwell shews me a receipt from the city treasurer, and one of the special committee referred to, for the payment of forty-one of these lots. He informs me that some little time ago he made an offer for these forty-four lots of \$265; that the matter had been standing until Monday, 25th inst., when he met the special committee for the purpose of having the transaction closed. He was informed amongst

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other things that Mr. Phillips was specially anxious to get lots 48, 49 and 50, West Dufferin Street, Samson Ward. I am informed by Mr. Caldwell that upon the condition he should without any further trouble get a deed for the forty-one lots he would consent to the sale to Mr. Phillips of the three lots, and this was agreed to, and upon this understanding he paid to the city treasurer the purchase price agreed upon for the lots and received a receipt upon which is endorsed the forty-one lots sold to him, and he now asks for a deed. Mr. Caldwell thinks it very strange that after all this and the city treasurer receiving the money, and without any notice to him, that a special meeting of the council should be held to deal with a matter that had already been closed with him. Evidently the special meeting of the city council did not repeal the by-law appointing the committee named therein, nor did the committee resign and they were not relieved in any way and, until the by-law was repealed, the city council had no legal authority to set aside the sale to Mr. Caldwell, or to in any way interfere with the actions of the committee, or the majority thereof. Mr. Caldwell stands by his legal rights. However, to avoid any litigation, but without prejudice to any legal rights he now has, he authorizes me to say that he is now prepared to pay \$265 for the forty-four lots in question, and this to be considered his previous offer and his present "sealed offer."

"Yours truly,

"W. Jeffers Diamond.

"I confirm the above as to the state of facts and as to offer for the forty-four lots. Jos. Caldwell."

These offers were brought before the special committee on the 29th April when the mayor wanted to have the highest offer accepted, but the other two refused to consent to it or to consider the offers submitted, contending that they had sold the lots and they passed it on to the council.

At this meeting of the special committee the solicitor and clerk was present, and advised the committee that they were not bound to carry out the sale, as the committee had not agreed to it, as their decision should have been unanimous.

The council met on the 2nd May when the plaintiff's offer, and the letters of the defendant's solicitor were brought up and a motion was made that the mayor and treasurer be instructed to execute and deliver to Joseph Caldwell a conveyance of the forty-one lots for \$235, the forty-one lots being those specified on the back of the receipt given by the treasurer to Mr. Caldwell on April 25th, 1904.

On May 2nd a further letter was received from the defendant Caldwell's solicitor:

"Belleville, May 2nd, 1904

"W. W. Chown, Esq.,

"Mayor and City Council:

"Gentlemen:

"*Re Roberts Estate Lots.*

"On the 27th April your city solicitor and clerk Mr. Mikel, wrote to my client Mr. Caldwell in reference to the lots that he had purchased and paid for, and which letter was placed in my hands to reply to. On the 29th I did reply to and the same was received by Mr. Mikel before noon of the 29th. This was, I am advised, brought before the executive committee the same evening, but no action taken thereon, but was left over for future consideration. I now write under the instructions from Mr. Caldwell to demand the conveyance of the lots paid the city treasurer for and which lots are respectively specified on the back of his receipt. That unless the proper deeds are given to him that an action will be brought against the city to compel it to execute the same to him. The lots bought and paid for, and for which deeds are asked for, are those mentioned in the treasurer's receipt dated the 25th April, 1904. I am instructed further to say that since the purchase by Mr. Caldwell that he has entered into possession of some of them, and also rented them. I would ask that in considering this matter that my former contention as to legal position be placed before the council. Mr. Caldwell does not desire any litigation with this matter, but he wants it distinctly understood by the city council that he insists upon getting the lots that he bought and paid for and deeds given him."

The council consisted of the mayor and ten members. When

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the motion came before the committee of the whole, one member was absent, and of those present seven voted in favour of selling to the defendant Caldwell and three against it. On its coming before the whole council the report of the committee of the whole was adopted unanimously.

On May 4th a special meeting of the council was held at which ten members were present. There was some further discussion with regard to the matter, when a resolution was passed, without any opposition, that the solicitor should prepare a by-law for the sale of the forty-one lots.

At this meeting a letter was read from Mr. W. N. Ponton, as solicitor for Mr. Phillips, as follows :

" Re Phillips Lots.

" Sir :—

" On behalf of Mr. J. P. C. Phillips, I protest against any sale or disposition of the forty-four lots in the city of Belleville, referred to the city's official request for tenders and Mr. Phillips' tender in accordance therewith, being made to any person or persons other than my client, the said J. P. C. Phillips, and I notify you, as mayor of the city, not to sign or execute any memorandum or deed of the said lots to any person other than the said J. P. C. Phillips, whose marked cheque, payable to the order of the corporation of the city of Belleville in gold for \$326.50 you hold in payment of the said property, the same being the highest tender made for the forty-four lots referred to. Should any attempt be made to prejudice or interfere with Mr. Phillips' legal and equitable rights in this respect, an action will be brought against the city of Belleville, and against any officials of the city, personally, who may be parties to this illegal act, and I again call your attention to the legal and equitable rights of Mr. Phillips with regard to this property and other lots which have been the subject of the previous correspondence and negotiations, upon which rights and equities Mr. Phillips will also appeal and rely. The action of the city council at last night's meeting, if correctly reported, is, from my client's point of view, and in his opinion, nothing short of municipal outrage, for which, if attempted to be carried out, the members of the city council, who voted for it, will be held respon-

sible to him in his private capacity and also in his capacity as a ratepayer of the city of Belleville."

No by-law, however, had ever actually been passed.

On June 2nd an action was commenced by the plaintiff on behalf of himself as well as the other ratepayers of Belleville to restrain the sale to the defendant Caldwell, and an interim injunction was granted by ANGLIN, J.

On the cross-examination of the mayor, who was called on behalf of the plaintiff, he was asked by Mr. Mikel—

Q. There are a number of reasons why it would be better as a matter of policy for the city to sell these lots to some person other than Mr. Phillips, are there not?

Mr. Armour.—I object, this is irrelevant.

Mr. Mikel.—The question of policy.

His Lordship.—The right of the city council to sell these lots to whom they like, it seems to me, if they should sell them, as of course I should think that was undoubted unless an action should be brought, but I do not see that we need go into the reasons for it. We cannot shew the reasons. I do not understand why a Court can be asked to interfere with their decision. Of course, Mr. Armour has some reason to shew, but of course that will come later—the reasons.

Mr. Mikel.—I do not wish to trouble the Court with going into the questions of policy.

His Lordship.—They cannot say what their reasons were. It has already been said some of the members of the council thought it would avoid litigation—that they were practically bound to Mr. Caldwell, legally—at least legally they seem to have thought that they would be subject to litigation if they did not settle it, that seemed to be the reason the mayor suggests for the action of the council. But I do not see how you can suggest possible reasons which were not given.

Mr. Mikel.—Yes, my lord.

No evidence was called for the defendants.

The learned Judge delivered the following judgment:—

STREET, J.:—I am not able to see any question whatever to be reserved in this case.

There were some parcels of land which the city of Belleville

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had acquired for taxes. These parcels came down to forty-four lots. Mr. Phillips, the plaintiff, wanted them—Mr. Caldwell, the defendant, wanted them.

Mr. Phillips seems to have told the mayor that he was willing to give more than anyone else, but he appears to have been unwilling to put any offer in writing until he had found what Mr. Caldwell was willing to offer for them. Mr. Caldwell made his offer, but, believing that the mayor would disclose it to Mr. Phillips, so that Mr. Phillips might make a higher one, he communicated it (with some restrictions upon its being divulged to the other aldermen), to Alderman Panter, who was a member of the committee appointed by the by-law No. 1141, with the mayor and the treasurer, to receive offers and to decide upon the advisability of accepting same.

His offer was submitted to the treasurer by Mr. Panter, the mayor being in another room. Then, when these two men had agreed to accept it, they laid it before the mayor, who, being offended, refused to consider it at all.

Then it appears to have been considered by Alderman Panter and the treasurer, the majority of the committee, and by Mr. Caldwell, that his offer had been properly accepted and the latter gave his cheque to the city for the amount of his offer. The matter was brought up by the mayor at a special meeting the next day, and the special meeting of the council decided to call for tenders, and Mr. Caldwell's cheque was returned to him. He refused to accept it and returned it again. Tenders were called for and Mr. Phillips put in a tender for a higher amount, accompanied by a cheque for the amount of his tender. Mr. Caldwell also returned his original cheque to the treasurer with his tender.

Then the whole matter came before the city council and Mr. Caldwell's letter and tender were laid before them with the intimation that he looked upon himself as having a contract with the city, which entitled him to the lots, and that if they accepted any other offer he would bring an action against them. The whole matter and all these facts came before the city council, with the two cheques, and they appear to have unanimously agreed that it would be proper to complete the bargain which

had been begun with Mr. Caldwell and to take his money and to convey the lots.

Mr. Armour.—Your lordship will pardon me—that meeting was not unanimous—it was the meeting of the 4th of May when they ordered the by-law.

Mr. Mikel.—The decision in the council was practically unanimous—the decision only had three votes against it.

His Lordship.—The result was the council practically unanimously agreed to carry out the sale to Mr. Caldwell, after all the circumstances had been brought before them. They may have been moved to do so, perhaps, by Mr. Caldwell's intimation that he would bring an action against them, if they did not carry out the contract, which he appears to have made. They may have been moved to the conclusion by taking the view that Mr. Caldwell, under the circumstances, having made his offer to the committee appointed by them, and the majority of the committee having accepted it, and he, having paid his money in accordance with that resolution, they were bound, either legally or in honour to carry it out. The majority of the agents whom they appointed, properly or improperly, to sell these lands had agreed with him to sell to them and they thought that that bound them to carry into effect the actions of their agents—this committee. For some reason, at all events, having all the facts before them including the fact that one offer was larger than the other, they appear, in good faith—because there is no evidence of improper motive actuating them—they appear in good faith to have decided they ought to accept the lower of the two offers, and they did so.

Now it is not the custom of the Courts, where the matter comes before the council of a municipality and is fully considered by them, and they come to a resolution in regard to it in good faith, not being bound to any contrary conclusion to be a contract—the Courts, I say, are not in the habit of overruling or interfering with the action taken by the council. It is not at all infrequent for the lower of several tenders to be accepted for one reason or another. Where good faith is shewn, and there is no imputation of bad faith on the part of the council, the Courts would never tell them that it would be wrong to accept one tender or they should have accepted the other. The

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council are the proper parties to deal with the property belonging to the corporation and the Courts do not interfere with them in doing it, unless they are acting in breach of good faith, or in breach of contract, or in breach of some absolute trust binding upon them.

For these reasons, as I have stated, the plaintiff has no standing at all, and the action is dismissed with costs.

From the judgment the plaintiff appealed to the Divisional Court.

On January 17th, 1905, the appeal was heard before BOYD, C., MACMAHON, and MEREDITH, JJ.

E. D. Armour, K.C., for the appellant. The municipal corporation occupied the position of trustees in dealing with the corporate property, and are therefore amenable to the jurisdiction of the Court. This was expressly laid down in *City of Toronto v. Bowes* (1854), 4 Gr. 489, (1856,) 6 Gr. 1, 77 (1858), 11 Moo P.C. 463: There it is said that a municipal corporation entrusted with the management of the affairs of the municipality is subject to the same rule as is applicable to every other case of trust. The same principle is laid down in *Attorney-General v. Town Council of Goderich* (1856), 5 Gr. 402. The decisions under the English Act 5 & 6 Wm. IV. ch. 76, secs. 2, 92, which is the same as our Act, are to the same effect: *Attorney-General v. Mayor of Brecon* (1878), 10 Ch. D. 204; *Parr v. Attorney-General* (1842), 8 Cl. & F. 409, and the same principal is laid down under the Irish Act 3 & 4 Vict. ch. 108; *Attorney-General v. Mayor, etc., of Belfast* (1855), 4 Ir. Ch. R. 119, 142, 152, 156. The duty of the corporation was therefore to sell for the best price, and as the plaintiff's bid was the best it should have been accepted. The duty also is imposed on the council itself and cannot be delegated, and certainly not to a committee, one of whose members was the treasurer, who was not a member of the council. The most such a committee could do was to receive offers and submit them to the council. Here the committee, or rather a majority, undertook to enter into a contract with the defendant Caldwell. The course pursued by the committee was such as can-

not be supported. The majority had no right to deal with the defendant Caldwell secretly behind the back of the mayor, one of the members of the committee.

W. C. Mikel, for the defendants, the corporation of Belleville. The corporation are merely *quasi* trustees, and not trustees in the sense attributed to them by the plaintiff. The Courts have always held that where the matter is within the competence of the corporation, and they exercise their discretion in good faith, the Courts will not interfere. Some dishonest motive must be shewn; and nothing of the kind is shewn here: Dillon on Municipal Corporations, 4th ed. sec. 94, and cases there collected. The matter was clearly within the competence of the committee, and the treasurer, who was conversant with the whole matter, was the most competent person that could be appointed. It is the recognized practice in cases such as this to refer it to a committee to be dealt with, and the committee, after duly considering the matter, agreed to sell to the defendant Caldwell, and entered in a binding contract with him. It does not lie in the mouth of the mayor to say it was done behind his back as the two members offered to tell him the amount of the defendant Caldwell's offer, but he refused to consider the matter and left the meeting. In any event, this is of no importance as the matter came before the council when tenders were asked for and the defendant's tender accepted. There were valid reasons for accepting the defendant Caldwell's tender, and the corporation were prepared to shew what they were, when the evidence was rejected on the plaintiff's objection. In any event there should be a new trial.

W. Jeffers Diamond, for the defendant, Caldwell. The defendant Caldwell bought in good faith and in open market from those authorized by the corporation to sell, and he paid over the purchase price, which was accepted. In any event there is no cause of action against him, and therefore he should not have been made a party, and the action should be dismissed as against him with costs.

Armour, in reply. The fact of the council accepting the defendant Caldwell's tender is not of much importance when it is considered that the reason they did so was that they

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believed that a sale to him had already been made, and to refuse his tender would subject them to litigation. Then as to the alleged refusal to admit evidence by the defendants, all that the plaintiff objected to was to the admission of evidence of possible reasons. The only reason that appears was the one already stated, namely, the fear of litigation. As to the defendant Caldwell, he is clearly a necessary party. How could proceedings be taken to prevent an alleged sale to him being carried out without his being a party to the action.

February 17. BOYD, C.:—In December, 1903, the city of Belleville became the purchaser at a tax sale of the lots in question under the provisions of the Assessment Act R.S.O., ch. 224, sec. 184 (3). Under the statute as amended by 61 Vict. ch. 25, sec. 5, (O.) it became the duty of the council of the municipality to sell such lands within seven years, and pursuant to this requirement the lots in question were offered to be sold and sealed tenders invited from two competing private bidders, one of whom is the plaintiff suing for himself and all ratepayers of the city, and the other is one of the defendants.

It does not seem very material to dwell on the preliminary offers and the action of the executive committee thereon, for the matter was brought before the council, and the result was, as I have said, that sealed tenders were called for. Both parties responded, the plaintiff offering \$326.50 accompanied by a cheque marked good, and the defendant offering \$265 as cash.

The council moved and resolved to accept the lower offer against the protest of the higher bidder, and the only apparent reason assigned is that Caldwell threatened litigation if said offer he had made was not carried out, but it is said that the plaintiff also threatened litigation. I can see upon the evidence no sufficient grounds for the action of the council in accepting the lower and rejecting the higher offer—regarding the matter as one involving the due and proper administration of corporate property. No evidence for the defence was given in deference, I think, to the ruling of the learned trial Judge, who seems to have proceeded on this view, that the Courts exercise power over trustees which they do not exercise over the municipalities.

The relation of municipal trustees to the equitable jurisdiction of the Courts was first considered in this Province by Esten, V.-C., in *Patterson v. Bowes*, (1853) 4 Gr. 170, 180, and he came, to the conclusion that the legislation which in England defined the scope and object of corporate purposes so as to impress a distinct fiduciary character on corporate property and thereby attract the jurisdiction of equity, had worked to like result in the municipal legislation of the Province.

This doctrine was considered at some length in the case afterwards under its changed name of *City of Toronto v. Bowes*, 4 Gr. 489, by the first Chancellor of this Court who said, at p. 507, "The common council is in fact entrusted with the management of the affairs of the city of Toronto, and I am at a loss to discover why the rule applicable to every other case of trust should not be applied to this," and was also worked out by Spragge, V.C., at p. 520. So it is most emphatically stated by Draper, C.J.C.P., in the same case in appeal, 6 Gr. 1, at p. 78. "I arrive at the conclusion that under our Act . . the municipal council . . are collectively and individually trustees of such funds" (*i.e.*, whether arising from property or from sales; see p. 77 at bottom) "and are liable to be called upon to answer for their or his dealings with, or disposition of, such funds in like manner as private trustees are in respect of breaches of trust. And in the Privy Council, 11 Moo. P.C., at p. 524, affirming the Provincial Courts, Knight Bruce, L.J. said: "The members" of the council "are merely delegates in and for the town for its local administration. For every purpose at present material they must be held to be merely private persons having to perform duties for the proper execution of which they are responsible to powers above them."

It was also held in *Attorney-General v. Town Council of Goderich*, 5 Gr. 402, that a corporate body acting as a trustee is amenable to the jurisdiction of equity as an individual might be.

As to this particular land, it was acquired by the city under a peculiar provision of the law whereby the property was taken over as a satisfaction for the arrears of unpaid taxes thereon. It became corporate property and subject to the right of redemption by the owner; it so remained until sold. It takes the place, as it were of the unpaid taxes, and by the sale of the land

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there is afforded some opportunity of recouping the treasury for what is in default. Here the unpaid taxes on the lots amount to some \$367—a sum in excess of the highest offer made upon the tender.

The councillors had brought before them the correct line of action when it was said during their meeting that they ought to get all they could for the lots.

They were distinctly advised by their solicitor that no contract was made or could be enforced in respect of the Caldwell offer. This was correct advice. The minority advised that the higher offer should be accepted, and if no good reason can be given against this course, it is the proper course for the council as trustees to adopt. It is not advisable in dealing with the corporate (trust) property to dispose of it in a private way, but some steps should as a rule be taken to ensure competition; whether by inviting tenders or exposing to auction (with, it may be, a reserved bid). This method is recognized by the legislation in regulating the municipal power to acquire and dispose of "Wet lands," when it is deemed expedient to sell, part with or dispose of same it is to be "by public auction, in like manner as they may by law sell or dispose of other property," R.S.O., 1897, ch. 223, sec. 556 and same section in the Act of 1903.

Of course the money derived from the sale of the land bought for arrears of taxes can be applied to any legitimate purpose of the corporation; and, even if regarded as "general funds" of the municipality (section 424) would be still of fiduciary character.

It was thought at one time that the Courts would not interfere to prevent trustees selling at and under value unless the injury was irreparable. This was so held in *Pechel v. Fowler* (1795), 2 Anst. 549, which case is published (though erroneously) in the revised reports as an exposition of the law, 3 R.R. 627. This case, however, was repudiated at an early date by the Court of Chancery. Thus in *Attorney-General v. Mayor, etc., of Liverpool*, (1835), 1 My. & C. 171, 210, the more modern practice is laid down in these words by the Master of the Rolls, soon afterwards Lord Cottingham, L.C.: "It has been the invariable practice when any act involving a breach of trust is intended to be done, though not in its language irremediable, where for

instance trustees contract to sell without proper care or in a way which the parties interested consider inconsistent with the trust, to apply to the Court to prevent them."

This rule was applied in a case where the amount involved was small (Malins, V.C., called it "insignificant"), and improper motives suggested: *Dance v. Goldingham*, (1873) L.R. 8 Ch. 902, where the Vice-Chancellor was overruled: James, L.J., saying at p. 912 "It would be *pessimi exempli* for us to say, 'a breach of trust has been committed, but the amount which any one *cestui que trust* suffers by reason of that breach of trust is not sufficient to justify a Chancery suit.'" And reasons were given in the early Canadian cases cited to shew that judicial supervision may properly be applied to ensure the well-working of the municipal system in regard to its administrative aspects as the holder and disposer of corporate property.

I think my brother Anglin was rightly advised to interfere at the outset by way of preliminary injunction so as to stop the sale at a less price than the highest offer till the facts had been ascertained. In their answer the corporation submits to conveying to the person entitled as between the two before the Court, the plaintiff is the one who should be accepted as purchaser; and if the corporation has no objection to this course that may now be directed. If, however, the corporation desires to prove good reasons which induced a preference for the co-defendant Caldwell there may be a further trial on that point with all costs reserved before the Judge at the trial. If the parties agree to close litigation at this stage—that being communicated to the Court will enable the Court to deal with the costs and any other undisposed of matters.

MEREDITH, J.:—This case presents several extraordinary features, which are not without some bearing upon the rights of the parties. The plaintiff is suing in respect of his rights as a ratepayer in common with all other the ratepayers of the municipality, and in their behalf as well as his own. The utmost that he contends for is that the defendants the corporation may gain \$67.50 if he succeed in the action; that, in the ultimate result, would possibly mean a reduction to the amount of perhaps a fraction of one cent in his taxation for one year; whilst

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they must in gaining that sum lose from four to twenty times as much (depending upon whether the case runs the whole or only part of the gauntlet of appeals) in the costs of the litigation; and, if there is to be a new trial as well, that will alone cause an additional outlay of from two to five times the amount involved; and besides this the plaintiff himself cannot but be out of pocket far more than the \$67.50 in costs between solicitor and client. It is, therefore, very plain that the action cannot really have been brought in the interests of the ratepayers; there must have been some ulterior object, and one need not go a step to find it. The plaintiff is a disappointed bidder for the lands which he asserts could have been sold for \$67.50 more than the municipal council accepted for them. Whatever hopes he may have had of being able by litigation to compel a sale of the lands to him have now been abandoned. He now admits that the corporation cannot be compelled to sell to him at all, nor indeed to sell to anyone at present: see *Anderson v. Board of St. Louis Public Schools*, 26 L.R.A. 707: so that resentment seems to be all that the action contains for him on his profit side of the claim. It is not, of course, the first case of throwing away a substance for a shadow, nor of biting off one's nose to spite one's face, but unfortunately all other ratepayers must be bitten too if the plaintiff succeed, and that without their consent to, or perhaps even knowledge of, this action brought ostensibly on their behalf. Again, an action might have been brought and obviously better relief had—if the ratepayers be entitled to any—in an action in one of the inferior courts against those members of the council who are causing that of which the plaintiff complains to be done; an action in which the costs might be comparatively insignificant, and which if the plaintiff wholly succeeded would be paid by such members and not by the municipality; an action after the sale had been carried out to compel such members to make good the \$67.50. It is very difficult to understand why such a speedy, inexpensive and effectual remedy, without any risk to the ratepayers at large, was not sought unless the purpose of the action was really to force a sale of the lands to the plaintiff, or resentment, or both. If the plaintiff have a good cause of action the fact that he may be prosecuting it through malice is, of course, no defence; but when he is seeking the extraordinary remedy

of injunction, in this Court, these circumstances may all weigh well in considering the question whether the relief ought should be granted, or should be refused leaving him to seek relief such as has been mentioned. In my opinion, the case was not nor is one for an injunction, having regard to all these circumstances. Interlocutory injunctions should be granted only for the prevention of what is called "irreparable injury," and no injunction should be made if the mischief complained of can be adequately compensated in damages, and minuteness of damage may be a ground for refusing an injunction. In *Dance v. Goldingham* L.R. 8 Ch. 902, a trustee for sale was selling under depreciatory conditions without justification. It was a plain case for the intervention of the Court; the interest of the plaintiff alone was said to be small, but it was very far from being minute, and it was also said that the whole of the substantial interest in question must be looked at, not merely the individual interest of the infant plaintiff. In this Province even that individual interest would hardly have been called insignificant: the land sold for about \$45,000, the plaintiff's interest was a one-thirty-fifth share in the residue of £3,500 sterling, about \$500 of a direct interest, over eight times the whole sum \$67.50 involved in this case. Here the plaintiff's interest is very indirect only and amounts to probably a fraction of one cent only. There is a great difference between the case of a shareholder, or ratepayer, seeking to prevent that which is *ultra vires* of the company or corporation, and the case of a shareholder, or ratepayer, seeking interference in matters within the powers of the company or corporation and affecting only matters of internal management. This case seems to me very like an abuse of that part of the machinery of this Court which permits and provides for class actions.

But upon the merits I entirely agree with the learned trial Judge, that the plaintiff failed to prove any good ground of action, No one disputes that for certain purposes the members of the council are in a sense trustees for the ratepayers, nor do I dispute that the corporation may be enjoined from carrying into effect an illegal act of the council, but there are differences in trustees. The term trustee is a very broad one. One may have very broad discretionary powers, another may have none. What

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might be a breach of trust in one may be quite within the powers of the other. It depends upon the character of the trust. It cannot be questioned that in many, perhaps in by far the most, of their duties, the members of a council are entirely beyond the powers of the courts or the will of the ratepayers. They may in their discretion pass by-laws which have the effect of greatly reducing the income, or greatly increasing the outlay, of the corporation, as well as exercise other powers to the grievous burdening of the ratepayers who are without any remedy except that which the annual election of the members of the council affords them; indeed, we are not without cases of judicial scolding of councils for even seeking the opinion of the ratepayers upon questions of great importance to them pecuniarily and otherwise: *Darby v. Corporation of Toronto* (1889), 17 O.R. 554, and *Helm v. Corporation of Port Hope* (1875), 22 Gr. 273. In the case of a mere trust for sale, it is said that the usual course is for the *cestuis que trust*, who are the persons most interested in the matter and who have the strongest motives for making the best bargains possible, to enter into a conditional contract for sale and then obtain the consent of the trustees; a course obviously inapplicable to a sale such as that in question.

Before the plaintiff can succeed in this action he must shew that the acts of the council were *ultra vires*, or in some other sense illegal. The allegation is that they were bound to sell for the highest price obtainable, and that they did not. But that is not necessarily so; there may have been many reasons why the highest price might not mean the best sale. It is not enough to give a cause of action to say merely, "I offered \$326.50 and you sold for \$265." This is far from being a case in which the most money received meant the best sale. It might have been far better to give the lands away to some purchaser than to sell to this plaintiff for \$326.50. The actions of a municipal council are not to be adjudged invalid, if within its powers, unless misconduct is shewn; none is shewn and none is to be inferred from the mere fact of selling in such a case as this for \$265 to one person rather than to another at \$326.50. It is to be assumed that the elect of the ratepayers are acting in good faith and in the best interests of those they represent until the contrary is shewn.

The Court is not to sit as a court of upper chamber of the municipal council where a lower tender to buy from or a higher tender to sell to a municipal corporation is accepted; it is not to be assumed that there has been bad faith or want of knowledge or care on the part of the council; it may rather indicate that there has been more than usual care. It is not as if the corporation were selling an article and parting wholly with all pecuniary interest in it. The interest they retained was infinitely greater than that which they sold, the right for all time to tax the lands, their interest in having them occupied by many persons, and increased in value as much as possible, so as to be income producing instead of remaining of so little use or value to anyone that the yearly taxation could not be exacted from them. A tenderer may be so improvident, so litigious, or so dishonest that it would be unwise to accept him as a purchaser at any price; but the members of the council are not bound to tell him so, nor to publicly announce such reasons; and it is not to be assumed that they had no reasons for the rejection because they have not been expressed, nor is it the reasons expressed, but it is the causes which actually exist, that ought to prevail. There may be many good reasons for rejecting an otherwise attractive tender. Is an action to lie for such rejection, and is the rejected tender to be forced upon the municipality unless the reasons for its rejection are laid bare to a trial Judge, and meet with his approval? Is it enough to give a right of action for the tenderer to say I offered more to buy from or less to sell to the corporation than was accepted? Can the plaintiff insist upon being appointed city clerk if he can satisfy a Judge that he is as competent as the person now holding that office and is willing to do the work for \$67.50 less? Although municipal institutions have been in existence in this Province for upwards of half a century, no case has been found supporting the plaintiff's position; on the contrary there have been several within my experience—whether reported or not I cannot tell—in which the Courts refused to interfere in such a case in the absence of established misconduct or illegality.

The cases cited give no countenance to the plaintiff's claim: The *Bowes* case was one of a member of the council through concealment of facts making a profit of his office: in the *Helm*

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case the corporation was restrained from expending moneys for what were held to be *ultra vires* purposes: in the *L'Abbe* case the member of the council was making a profit of his office: in the *Raikes* case the council were applying moneys held by them, on the special consent of the ratepayers, for a specific purpose, to another purpose; and the cases of *Attorney-General v. Mayor, etc., of Aspinall* (1837), 2 My. & C. 613: *Attorney-General v. Mayor, etc., of Newcastle-on-Tyne*, [1892] A.C. 568, and *Attorney-General v. Vestry of Bermondsey* (1883), 23 Ch. D. 60, were also all cases of *ultra vires*, misappropriation of corporation moneys: see the following cases, which are very much more in point: *Haggerty v. City of Victoria* (1895), 4 B.C. 168; *Finley v. City of Pittsburgh* (1876), 82 Penn. St. 351; *People v. Hunt*, 120 Ill. 655; *Talcott v. City of Buffalo* (1891), 125 N.Y. 290. If we are to interfere in this case we must also do so should the council accept the plaintiff's offer and the defendant Caldwell or some other person then outbid him, and so on without limit. Even in sales by the Court, in which price is generally the only consideration, the one thing sought, the master is not always bound to accept the highest bid, but ought to consider all the circumstances: see *Re Costello* (1845), 2 J. & L. 244: and the discretion of even subordinate officers exercised upon proper principles, is seldom interfered with: see *Re Oriental Bank Corporation* (1887), 56 L.T.N.S. 868. After fair, competent business men, the elect of all the ratepayers, have exercised their discretion in this matter, with a knowledge of all the circumstances, impossible of being wholly conveyed by evidence adduced at a trial, I would have little confidence in my own opinion if it differed from theirs. The subject is one in regard to which the almost intuitive opinion of an experienced municipal business man is more likely to be right than the minute calculations of the mathematician or the studied deductions of the logician. One of the chief justices of England has said that: "Surely it is not too much to say that in matters which directly and mainly concern the people of the country, who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than

judges;" words to which I heartily subscribe, and think applicable to more than merely legislative powers.

The contention of the plaintiff that the defendants were bound to prove the circumstances which made it better for them to sell to the defendant Caldwell comes with ill grace from him, for the defendants desired to give in evidence additional facts shewing the wisdom, as well as good faith, of their action, but that evidence was rejected upon the plaintiff's own objection to it. Had a *prima facie* case of misconduct been made out it would have been admissible, and I have no doubt would have been admitted; in the absence of that, it was unnecessary; no case having been proved, the action was rightly dismissed.

But if it is to be taken that the plaintiff made out a *prima facie* case, it is not, in my opinion, necessary to send the case back for a new trial, so that the defendants may adduce the evidence which was rejected at the plaintiff's instance, because enough appears in the facts already disclosed—the undisputed facts—to prevent any court from interfering with the sale made to the defendant Caldwell, enough to shew that the action of the council was not only justifiable, but the only course which in fair dealing they could have adopted, and the one most in the interests of the ratepayers. The lands were so unsaleable that they could not be given away on the terms of building and residing on them; it was important to get rid of them so that they might not remain waste municipal lands, but should become tax-bearing again and improved and as thickly occupied as possible as soon as possible. So the council directed that the several lots be sold for the taxes against them, and if that price could not be obtained, then for the best price that could be obtained, and appointed a committee of three persons to carry out these directions. There were fifty lots in all, and negotiations for the sale of them went on for some time, the only bidders being the plaintiff and the defendant Caldwell. The best bid the plaintiff ever made for the whole number of lots, before the first two sales to the defendant Caldwell, was \$150. The defendant Caldwell bought nine of these for \$150, and five more for \$50, leaving forty-four unsold, and having paid for the fourteen \$50 more than the plaintiff had ever offered for the whole fifty-eight.

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Negotiations then continued as to the forty-four unsold lots. The defendant Caldwell seems to have offered \$125. Nothing was done upon that offer. The plaintiff then offered \$150, and the defendant Caldwell \$200, and then, having been informed by one of the committee of that offer, the plaintiff offered \$210. After this nothing was done for some little time when the plaintiff offered \$30 for three of the forty-four lots, and the defendant Caldwell offered \$265 for all of the forty-four. A majority of the committee then sold the three lots to the plaintiff for \$30 and the remaining forty-one to the defendant Caldwell for \$235, being the amount of his offer for the forty-four lots less the price of the three sold to the plaintiff. The money was paid by the defendant Caldwell, and an apparently sufficient memorandum in writing of the sale, signed by the treasurer of the corporation, who was also a member of the committee, was given to him. One of the committee, who had been acting in the plaintiff's interests in the negotiations, refused to take part in the sale because the other members would not let him know beforehand the amount of the defendant Caldwell's offer, as he had been unfairly, as they thought, communicating to the plaintiff information as to the amount of the defendant Caldwell's bids, which information he had obtained as a member of the committee, and so refusing, and, having the power to do so, he called a meeting of the council, and the council, without hearing the parties, resolved that they be notified that the committee would on a certain day receive sealed tenders for the forty-four lots; they were notified: the plaintiff offered \$326.50; the defendant Caldwell, through his solicitor, wrote setting out his claim at length, and insisting upon his rights as purchaser, but, the solicitor adding, to avoid litigation, "and without prejudice to any legal right he now has, he authorizes me to say that he is prepared to pay \$265, for the forty-four lots in question, and this is considered to be his previous offer and his 'sealed tender.'" The committee met and having considered the whole subject again, the same majority refused to sell to the plaintiff because the lots had been already sold, and they referred the matter to the council, who again fully considered it and eventually unanimously resolved that the sale to the defendant Caldwell should

be carried out. No doubt whatever has been thrown upon their absolute good faith, the resolution was the result of their best judgment, having in view only the welfare of the municipality; nor can I think any one can well doubt the fairness and wisdom of their choice. In the matter of obtaining tenders nothing could be more detrimental to a corporation than unfairness to tenderers, even a suspicion of secretly making known the sums named in the tenders, so that others might take advantage of the knowledge, is more than likely to prevent honest and fair men from tendering. The utmost good faith must prevail if the advantages of that excellent means of transacting business are desired and to be had. Far better make a loss in one case than earn a reputation for unfair dealing; a sale was fairly made to the defendant Caldwell of the forty-one lots, a sale which any honest and prudent man would have felt bound to carry out. We may ignore these things, we have not to pay the taxes, but no practical business man would or could. The Court ought not in its zeal for the *cestui que trust* to force the trustee to be dishonest towards others. A mere trustee for sale, who has once contracted in good faith to sell, will not be allowed to invalidate the contract because a higher price is offered: see *Harper v. Hayes* (1860), 2 De G. F. & J. 542. The unfair practice—"a most pernicious practice most unfair to the purchaser and most prejudicial to the vendors"—of opening biddings in Court sales for merely a better offer, was long ago abolished, see *Re Bartlett* (1881), 44 L.T. N.S. 17; 16 Ch. D. 561. But if the council were obliged to be unfair, if not dishonest, provided they could make a few more dollars out of the transaction, it seems to me, even in the after knowledge that we now have, that they chose that course which from a pecuniary point of view only was best. There were three courses open to them (1) to sell to the plaintiff; (2) to sell to neither of the tenderers; or (3) to complete the sale to the defendant Caldwell. Admittedly and obviously the plaintiff had no contract, no pretence of any right to a conveyance to him. Obviously it would have been very unwise to convey to him, for if the defendant Caldwell established his claim, the corporation would have put it out of their power to

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comply with it and would have been answerable in damages. To convey to neither would have been to risk an action by each, and so a plainly unwise choice; whilst to convey to the defendant Caldwell left them open to an action by the plaintiff, a thing which to any reasonable man would have seemed highly improbable, for there are few who would undertake such a course, when the utmost that could be expected to be gained would be, at the best, a few cents very indirectly, at the direct loss of many dollars in solicitor and client costs, besides the personal loss, inconvenience and worry which every litigant undergoes, and the risk of losing, and having to pay all costs. And, beside all this, I am by no means satisfied that the defendant Caldwell could not enforce specific performance of his contract. It is said for two reasons that he could not, (1) because the council could not authorize the committee to make the sale; and because (2) a majority of the committee could not act, they could act only if unanimous. I am far from thinking there was an unauthorized delegation of power; there must of necessity have been power to delegate authority to some extent; the council must necessarily employ servants and agents for many purposes, its members cannot very well be its janitor. Here the council determined to sell and fixed the price of the land—the amount of taxes against it, or, if that could not be had, the best offer that could be obtained. Why could not the council avail itself of the services of a land agent, or employ an auctioneer, to sell for them, as any other owner might? Upon the other point, it is true that the clerk of the municipality, who is a solicitor, informed the council that the defendant Caldwell could not enforce his contract because the committee had not been unanimous, but the members of the council knew that in the case of all other of its committees a majority ruled, and that this committee was not intended to be any exception, and that no one had objected to the contract upon that score, and if, in view of all these things, they differed from the clerk, I am very much inclined to think that the intuitive opinion of the ten business men was preferable to that of the one professional gentleman. And the action of the majority of the committee was, as I have said, confirmed by

the council unanimously. There was nothing like a waiver of the defendant Caldwell's right under the contract, that is to buy the forty-one; he throughout plainly held to that; his renewed offer of the \$265 was for the forty-four lots, and expressly without prejudice to his rights as to the forty-one, if the forty-four were not sold to him. If the defendant Caldwell could enforce specific performance this action cannot lie, and whether he could or not, it, in my opinion, fails for more than one reason, and was rightly dismissed, as this motion should be.

MACMAHON, J., concurred with BOYD, C.

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APPENDIX.

Cases reported in the Ontario Law Reports decided on appeal to the Supreme Court of Canada, reported since the publication of Volume 8, Ontario Law Reports.

BLACK v. IMPERIAL BOOK Co., 8 O. L. R. 9—Affirmed 35 S.C.R. 188.

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ARBITRATION AND AWARD.

Non-compliance with Direction of the Court—Refusal to State a Special Case—Bonâ fide Application—Remittal to Arbitrator—R.S.O. 1897, ch. 62, sec. 12, sub-sec. 2, sec. 41.]—On a motion to set aside an award:—

Held, that an arbitrator to whom an award had been remitted “to find and make his award as to the ownership” of certain property had not complied with that direction by *vesting* the property in one of the parties as owner.

Held, also, that, an application having been made *bonâ fide* to him before the award was

signed, to state certain questions of law in a special case for the opinion of the Court, or to adjourn the matter until an application to the Court to direct him to state a special case had been disposed of, his refusal to do so was a ground for remittance to him for further consideration. *In re Palmer & Co. and Hosken & Co.*, [1898] 1 Q. B. 131, followed. *Re Powell and Lake Superior Power Co.*, 236.

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BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Promissory Note—Illegal Consideration — Contract in Restraint of Marriage.*]

The plaintiff had for several years been housekeeper for a widower with a young daughter, and being about to be married, he promised her, if she would continue in his service as housekeeper so long as he needed her and abandon her contemplated marriage, he would either pay her \$1,000 in cash, give her a promissory note for \$1,500, or remember her in his will. The plaintiff thereupon abandoned the marriage and continued her service until her employer's death, which occurred four years afterwards, he, in the meantime having given her a note for \$1,500. In an action against his administrator on the note:—

Held, that the primary object of the agreement was the continuing in the intestate's service, the restraint of marriage being merely an incident thereto, and that, under all the circumstances, the restraint was not such an unreasonable one as could be said to be contrary to the policy of the law.

Judgment of Street, J., 6 O.L.R. 708, reversed. *Crowder-Jones v. Sullivan*, 27.

2. *Promissory Note—Indorsement in Blank—Alteration to Special Indorsement—Subsequent Substitution of Name of New Special Indorsee.*]

A bank, being the holders in due course as collateral security to the account of a customer of a promissory note indorsed in blank, put their name with a stamp immediately above the indorser's name, thus converting the indorsement into a special one. Subsequently, and after maturity of the note, the account was taken over by the plaintiff bank, the intention being that the note in question and other collateral notes should pass with the account. The manager of the transferring bank handed the notes to the manager of the plaintiff bank, who, with a stamp, superimposed upon the name of the transferring bank the name of the plaintiff bank, the manager of the transferring bank authenticating the change by his initials:—

Held (Street, J., dissenting), that there had been a valid transfer, and that the plaintiffs were holders of the note in due course.

Judgment of Morgan, Co.J., affirmed. *Sovereign Bank of Canada v. Gordon*, 146.

Cheque—Conditional Payment—Bills of Exchange Act.]
—See *Hately v. Elliott*, 185, post CONTRACT, 2.

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OF MARRIAGE.**

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BROKER.

Carrying Stock on Margin—Advances by Broker—Pledge of Stock—Sale without Notice—Laches—Measure of Damages.]—The plaintiffs bought stock as the defendant's brokers, and advanced moneys on it, holding it in pledge. They sold the stock at a loss, without notice to the defendant, and on the 19th June, 1903, notified him that they had done so, and of the state of his account, but no objection to the sale was taken by him until the present action was brought in December, 1903:—

Held, that the sale, though wrongful, did not disentitle the plaintiffs to sue for the balance due them on account of advances.

The contract of the plaintiffs with the defendant was one which did not oblige them to carry the stock to a particular day; nor the defendant to pay for it at a particular day; but did not permit the plaintiffs to sell without notice.

Held, however, that inasmuch as it appeared that even if the stock had not been sold, the defendant would have continued to hold it up to the time of the trial, and as its market value at the trial was less than it had been sold for, the plaintiff's sale had been a benefit to the defendant, and, therefore, he was not entitled to recover damages.

Semble, *per* Street, J., that the proper measure of damages in such a case is the price of the stock at the day of the wrongful sale or the price at the day of trial, at the option of the owner of the stock.

Held, also, *per* Street, J., that considering the fluctuating nature of the stock in question, the defendant had delayed an unreasonable time in objecting, and must be treated as having adopted and ratified the sale; but that as pledgees the plaintiffs were not entitled to sell the shares without notice, and the defendant would have been entitled to damages had it not been for his non-objection. *A. E. Ames & Co. v. Sutherland*, 631.

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*Bedford, Duke of, v. Ellis,
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*Cameron v. Walker, 19 O.R.
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*Carey v. Smith, 5 O. L. R.
209, in part overruled.]—See*
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*Corneil v. Irwin, 2 O.W.R.
466, followed.]—See* TRIAL, 1.

*Coulter v. Equity Fire Ins.
Co., 7 O.L.R. 180, affirmed.]—
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*Crowder v. Sullivan, 6 O.L.R.
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*Elgin Loan and Savings Co.
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dent Co., 8 O.L.R. 117, reversed
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*Finch v. Gilray, 16 A.R. 484,
applied.]—See* LIMITATION OF
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*Grattan v. Ottawa Separate
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*Groves v. Wimborne, [1898]
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*Kingston, City of, v. Kings-
ton, etc., Electric R.W. Co., 25
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*Lennox, Re, 4 O.L.R. 378,
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*Lount v. London Mutual
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*McIntyre, Re, McIntyre v.
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ciation, 5 O.L.R. 424, affirmed.]
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Quay v. Quay, 11 P.R. 258, explained.]—See COSTS, 3.

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Thornton v. France, [1897] 2 Q.B. 143, referred to.]—See LIMITATION OF ACTIONS, 2.

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COMPANY.

1. *Transfer of Shares—Right to have Recorded—Resolution Closing Books—Invalidity of—Mandamus.*]—A transferee of fully paid up shares in a company incorporated under the Ontario Companies Act, R.S.O. 1897, ch. 191, is entitled, on the presentation to the company of a transfer of shares, to have it recorded in the books of the company, the directors, in the absence of a by-law under subsec. 47 (a), having no discretion in the matter.

Where, therefore, under a resolution of the directors, there being no by-law for the purpose, the books were closed for a brief period for the alleged purpose of avoiding confusion or inconvenience in ascertaining the shareholders entitled to vote at the annual meeting, and during such period the company refused to record a transfer of shares, a mandamus was granted compelling each transfer to be recorded. *In re Panton and Cramp Steel Co., Limited, et al.*, 3.

2. *Winding-up—Creditor—Validity of Claim—Right to Rank on Assets.*]—W. was president of the A. Loan Company, and also a member of a firm of stock brokers interested in a block of the common stock of a coal company, which it was desired to place in the hands of permanent investors. Another loan company, the E. Company, had a large savings bank account with the A. Company, and, as the E. Company contended, to enable the former company, which was empowered to invest in stocks, which the E. Company was not, to purchase a number of these shares, it was arranged, through W., that the E. Company should lend the A. Company \$55,000, the amount required for such purchase, on the security of a debenture for the amount to be issued by the A. Company; the E. Company also to hold the stock purchased as collateral security, and to be paid five per cent. interest, or, at their option, to have the dividends on the stock, and to receive one-half of any profit that might be realized on the stock when sold:—

Held, on the evidence fully set out in the case, that the transaction was a *bonâ fide* one, and not merely a device to enable the E. Company to invest in the stock, and that the E. Company was therefore entitled, in winding-up proceedings against the A. Company, to rank as creditors on the assets of that company. *Re Atlas Loan Co. —Elgin Loan Co.'s Claim*, 248.

3. *Winding-up — Inspector—Purchase of Assets—Liquidator—Sale of Assets—Approval of Court.*]—An inspector appointed in liquidation proceedings under the Dominion Winding-up Act, R.S.C. 1886, ch. 129, is in a fiduciary position as regards the disposal of the assets, and cannot, without the consent of all persons interested, become the purchaser thereof.

In such liquidation proceedings the power to sell the assets is by the Act vested in the liquidator, not in the Court, though the liquidator must obtain the approval of the Court as a condition of exercising the power of sale.

Judgment of MacMahon, J., 8 O.L.R. 581, affirmed. *In re Canada Woollen Mills, Limited —Long's Appeal*, 367.

4. *Loan Company — Winding-up — Shareholders Contributing to Reserve Fund—Rights of Creditors.*]—Shareholders in a loan company, in answer to a proposal from the company, paid, towards the reserve fund, dividends paid to them by the company and various other sums of money, with a view to increase the reserve fund to the same amount as the paid-up stock. In winding-up proceedings:—

Held, that such shareholders were not entitled to rank as creditors upon the assets of the company with the other creditors, depositors, and debenture holders, and that any claim they had against the company

and its reserve fund was subject to the payment of the debts of the company.

Judgment of Britton, J., 7 O.L.R. 706, affirmed. *Re Atlas Loan Co.—Claims on Reserve Fund*, 468.

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See CRIMINAL LAW, 7.

CONSTITUTIONAL LAW.

See CRIMINAL LAW, 3.

CONTEMPT OF COURT.

Newspaper Editorial—Controverted Election.]—Having regard to the principle that the summary remedy of committal for contempt because of comments on a matter *sub judice* should be granted only when it clearly appears that the course of justice has been or is likely to be restricted or impaired to the prejudice of the applicant, the Court refused a motion to commit the editor of a newspaper because of comments made

in an editorial, pending the trial of an election petition in which the applicant, the member elect, was respondent, upon his election methods and expenditure, especially as, after the argument of the motion, the petition and a cross-petition—both containing many charges of corrupt practices—had come on for trial, and, no evidence having been offered on either side, had been dismissed, the applicant then resigning the seat. *In re North Renfrew Election*, 79.

CONTRACT.

1. *Statute of Frauds—Contract for Purchase of Flour—Letter Signed by Plaintiff—Entry in Defendants' Book—Name of Defendants on Fly Sheet—Signature.*]—The essence of signature, whether made by writing or stamp or print, must be to authenticate or identify the contract by the party to be charged.

In an action for breach of a contract in the form of a letter from the plaintiffs to the defendants to "enter our order for two thousand barrels Prairie Rose Flour at \$4.10 per barrel . . . cash discount $\frac{1}{2}$ of 1 per cent.—we to have option of another three thousand barrels . . . provided option is taken up by . . . delivery as required," in which it was shewn that an entry was made in the defendants' contract book among other orders, "1903, Dec. 30. By 2,000 P. Rose, \$4.10, cash dis. $\frac{1}{2}$ of 1 per cent.," under the

heading of the plaintiffs' company name and that the fly sheet of this book had the defendants' company name stamped on it, which had been put there some years before to mark the time when a newly organized company began operations:—

Held, that the contract was not proved according to the requirements of the Statute of Frauds. *Nasmith Company of Toronto, Limited, v. Alexander Brown Milling and Elevator Company, Limited*, 21.

2. *Illegality—Unduly Lessening Competition—Trade Association—Criminal Code, sec. 520 (d)—Cheque—Conditional Payment—Bills of Exchange Act.*—All the importers of coal in a certain town combined themselves into an association and bound themselves not to sell below fixed prices, and that any member who did so should become liable to the association for \$1 for every ton of coal so sold:—

Held, that the association was an illegal one, being a combination, conspiracy, or agreement "to unduly prevent or lessen competition in the . . . purchase, barter, sale, or supply of an article or commodity which might be the subject of trade or commerce," within the meaning of sec. 520 (d) of the Criminal Code; and the plaintiff, acting as agent of the association, could not recover on a cheque given by a member of the association in pursuance of one of the articles of the association.

Semble, that evidence is necessary in such a case to shew that competition in the sale of the articles concerned has, as a fact, been unduly prevented.

The cheque in question was marked "cheque conditional deposit," being intended, as the drawer, a member of the association, explained, to be conditional on his obtaining a certain contract:—

Held, that it was not an unconditional order to pay, and therefore not a cheque within the requirements of secs. 3 and 72 of the Bills of Exchange Act, 53 Vict. ch. 33, secs. 3, 72 (D.) *Hately v. Elliott*, 185.

(See also *post* CRIMINAL LAW, 7.)

3. *Religious Society—Member of—Service in—Dismissal from—Disfranchisement—Damages—Release—Foreign Association—Statute of Frauds.*—The defendant the society was a religious association, incorporated under the laws of France, having local institutes in the United States, Ontario, Quebec, and other countries, separately incorporated according to the laws of those countries, composed of two classes of women, those destined for teaching and lay sisters employed in household duties, with periods of probation, during the second of which they took vows of poverty, chastity, and obedience, and became "aspirants," before being permitted to take final vows, up to which latter time the society, according to

its rules, retained the right to dismiss them for grave causes; that right belonging to the Superior-General in France, who might communicate it to others.

Plaintiff became a lay sister in the United States in 1884, and was admitted to the three vows of an "aspirant," but proceeded no further, remaining an "aspirant" only, until dismissed.

In February, 1901, she was transferred to an institute in Ontario until the following June, when, in consequence of great disturbance and destruction of property, ascribed to her, she was removed to an asylum, on the certificate of two physicians, as insane, until the following September, when she was declared cured and discharged.

The defendant the Lady Superior of the local organization, reported the facts to the Superior-General in France and asked for a discharge of the plaintiff from her vows; which was sent to the Lady Superior, to be used as she considered expedient, and she caused it to be delivered to the plaintiff after her release from the asylum; and the plaintiff executed a release, prepared by the society, of all causes of action, contracts, etc., in consideration of \$300.

Plaintiff brought an action against the society, the institute, and the Lady Superior, for compensation as on a *quantum meruit* in respect of her 17 years' services and damages for wrongful dismissal, false imprisonment, and imputation of insanity, alleging that the re-

lease was obtained from her by importunity and undue influence:—

Held, that there was jurisdiction to entertain the action in this Province against the society, upon the ground that the society "resides" in this Province, and that the defence of the Statute of Frauds failed.

Held, also, that the action was properly dismissed as against the institute, and should be dismissed as against the Lady Superior, with neither of whom was there any contract, and the jury had absolved the latter from all liability in tort.

Held, lastly, that there was no liability of the society for compensation for services or damages, and that the defence based upon the plaintiff's release should be sustained. *Archer v. Society of Sacred Heart of Jesus*, 474.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1—CRIMINAL LAW, 3—INSURANCE—MASTER AND SERVANT, 4, 5—MUNICIPAL CORPORATIONS, 1—NEGLIGENCE, 2—PRACTICE, 3, 4—PRINCIPAL AND SURETY—SALE OF GOODS—SPECIFIC PERFORMANCE—STREET RAILWAYS.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE—RAILWAY.

CONTROVERTED ELECTIONS.

See CONTEMPT OF COURT—MUNICIPAL CORPORATIONS, 2—PARLIAMENT.

CONVICTION.

See CRIMINAL LAW—GAMING.

COSTS.

1. *Action to Establish Will—Unsuccessful Defence of Fraud and Undue Influence.*—In an action to establish a will, in which the defendants set up an unsuccessful defence of fraud and undue influence:—

Held, considering the mode in which the testator had executed the will, and the conduct of the beneficiaries under it, that all parties should have their costs out of the estate. *Gilbert v. Ireland*, 124.

2. *Scale of Costs—Damages at Trial, \$400—Remaindermen—Variation of Judgment to Present Value, \$180—County Court Jurisdiction.*—In an action by remaindermen against a life tenant of a farm and the purchaser of the timber for selling the latter, the trial Judge found for the plaintiff and assessed the damages at \$400, to be paid into Court, and paid out to the plaintiffs on the death of the life tenant, who was to have the interest in the meantime. On an appeal to a Divisional Court the judgment was affirmed as to the amount of damages, but varied by directing that instead of the \$400 being paid into Court, and the life tenant receiving the interest, the present value of the plaintiffs' interest should be paid to them, fixed at \$180:—

Held, that although the formal judgment adjudged that the trial judgment "is hereby varied by reducing the sum payable by defendant to the plaintiffs for damages from \$400 to \$180, which latter sum shall be paid forthwith by defendant to the plaintiffs," the plaintiffs were entitled to costs on the High Court scale.

Held, also, that a defence by the life tenant, that payments had been made by her on an existing mortgage to the amount of \$1,600, and claiming that she should be subrogated to the mortgagee's rights, and by the purchaser, that he had bought the timber for value without notice, raised the question of title to an interest in land to a greater value than \$200; and the County Court had no jurisdiction. *Whitesell et al. v. Reece*, 182.

3. *Taxation—Objections—Appeal from Local Taxing Officer—Reference to Taxing Officer at Toronto.*—As a foundation for an appeal from a taxation of costs between party and party, objections must be filed with the officer taxing, and these objections must be directed to specific items; or, *semble*, at the least, if a general objection is relied on, it must be expressly stated to be directed to each and every item in the bill. A general objection that the bill is exorbitant is not sufficient.

Upon a mere general objection of this kind, or even upon specific objections to specific items,

the Judge before whom an appeal from the taxation of a bill by a local taxing officer comes for hearing, has no right to refer the bill to one of the taxing officers at Toronto for revision or retaxation. He may ask the opinion of one or both of these officers as to any question arising, but he must himself decide the points involved. *Quay v. Quay* (1886), 11 P.R. 258, explained.

Judgment of Falconbridge, C.J.K.B., reversed. *Campbell v. Baker*, 291.

4. *Security for Costs—Father of Infant Suing as Next Friend and also Personally.*—In an action brought by the father of an infant as his next friend, and also on his own behalf, for an injury sustained by the infant, the father residing out of, and the infant within, the jurisdiction, the father was directed to give the usual security for costs, and it was ordered that in default his claim should be struck out. *Felgate v. Hegler*, 315.

5. *Appeal to Privy Council—Costs Incurred in Canada—Ascertainment—R.S.O. 1897, ch. 48, sec. 7—Con. Rules 818, 1255 (818a).*—On an appeal from an order granted to the defendants upon a petition, pursuant to the suggestion in the judgment herein, reported 8 O.L.R. 174, at p. 186:—

Held, that Rule 1255 (818a) gives effect to R.S.O. 1897, ch. 48, sec. 7, and Rule 818, and does not carry the procedure beyond what is therein provided

for, and that by applying it, or even without it, the defendants were entitled under the Act and Rule 818 to have the costs ascertained “as if the decision had been given in the Court below;” and the appeal was dismissed with costs.

Judgment of Falconbridge, C.J.K.B., affirmed. *Earle v. Burland*, 663.

See PRACTICE, 1.

COUNCILLOR.

See MUNICIPAL CORPORATIONS, 2.

COUNTY COURT JUDGE.

See PARLIAMENT, 2.

COUNTY COURTS.

See COSTS, 2.

COURT OF APPEAL.

Leave to Appeal—Appeal from Divisional Court—Judicature Act, 1904, sec. 76 (1) (g)—Trivial Amount at Stake—Special Reason.—*Held*, on application by the plaintiff for leave to appeal to the Court of Appeal from the judgment of a Divisional Court, under sec. 76 (1) (g) of 4 Edw. VII. ch. 11—whereby such leave may be given (in cases other than those in which under that section the appeal lies as of right) where there are special reasons for treating the case as exceptional and allowing a further appeal

—that the amount at stake being very small (\$75), the fact that the decision on the facts or the law might be thought controvertible was not by itself special reason for treating the case as exceptional and allowing a further appeal. *Clipshaw v. Town of Orillia*, 713.

COURTS.

See COURT OF APPEAL—
DIVISION COURTS—PRACTICE,
2.

COVENANT.

See LANDLORD AND TENANT,
1 — MORTGAGE — VENDOR AND
PURCHASER.

CRIMINAL LAW.

1. *Stealing Post-Letter—Decoy Letter—Confession.*—Suspicion having been aroused as to the honesty of a letter carrier, the superintendent of the post-office wrote, in his office in the post-office, a letter to a person in the letter carrier's district, enclosed it in a duly addressed envelope, placed in the envelope bank notes of which the numbers had been taken, and put upon the envelope a stamp, which was then cancelled by impressing upon it the cancellation stamp of another post-office. The letter was then handed by the superintendent of the post-office to the superintendent of the letter sorters, who gave it to one of the sorters, and he placed it in the box in which letters for delivery

by the suspected letter carrier were being placed. The letter did not reach the person to whom it was addressed, and one of the bank notes was used by the suspected letter carrier and was obtained by a detective and shewn to the post-office superintendent. The superintendent then had an interview with the letter carrier and accused him of the theft, telling him that he had the bank note in question in his possession, and the letter carrier acknowledged his guilt:—

Held, that the letter in question was a "post letter" within the meaning of the definition thereof contained in the Post Office Act, R.S.C. 1886, ch. 35, sec. 2, as amended by 52 Vict. ch. 20, sec. 2 (D.), and 1 Edw. VII. ch. 19, sec. 1 (D.)

Held, also, there having been in fact no inducement or threat, evidence of the confession was admissible, the relationship of the superintendent to the letter carrier not being in itself sufficient to justify the inference of coercion, and the statement as to possession of the bank note, even if treated as a false statement, not making the admission of that evidence improper.

Leave to appeal from the judgment of Falconbridge, C.J., K.B., refusing to state a case, refused. *Rex v. Ryan*, 137.

2. *Joint Trial of Two Persons for Murder—Evidence—Confession of one Implicating the Other—Admissibility—Caution to Jury—Addresses to*

Jury—Right of Reply—Counsel Representing Attorney-General—Criminal Code, secs. 592, 661 (2).]—Upon the joint trial of two accused persons for murder, a statement or confession of one, which tended to incriminate the other, was admitted in evidence, the jury being cautioned that it was evidence only against the one who had made it:—

Held, properly admitted.

Semble, that in order to the admissibility of a statement made by an accused, having regard to sec. 592 of the Criminal Code, it need not appear that it is a full acknowledgment of guilt so as to be a confession in the strictest sense of the term. If it connects or tends to connect the accused, either directly or indirectly, with the commission of the crime charged, it cannot be excluded on the ground that it is not a plenary confession.

Semble, per Osler, J.A., that in a case where such a confession or statement is intended to be used the prisoners should be tried separately.

Held, that under sec. 661 (2) of the Code, the Crown represented by counsel acting on the instructions of the Attorney-General, had the right of reply, although no witnesses were examined for the defence.

Rulings of Falconbridge, C.J., K.B., upheld. *Rex v. Martin*, 218.

3. *Conviction — Penalty — Canvassing for Contracts—Un-registered Company — R.S.O.*

1897, ch. 205, sec. 2, sub-sec. 5; sec. 117—63 Vict. ch. 27, sec. 12 (O.)—4 Edw. VII. ch. 17, sec. 4 (O.)—*Intra Vires Provincial Legislature.*]—On an appeal from a conviction by a police magistrate for an offence under R.S.O. 1897, ch. 205, sec. 117, the Loan Corporations Act, as amended by 63 Vict. ch. 27, sec. 12 (O.), and 4 Edw. VII. ch. 17, sec. 4 (O.), set out in the judgment:—

Held, that the contracts referred to in clause (b) of 4 Edw. VII. ch. 17, sec. 4, is not restricted to such contracts as are mentioned in sub-sec. 5 of sec. 2 of R.S.O. 1897, ch. 205.

Held, also, that as the effect of clause (b) is to prohibit the making of such contracts as are dealt with by that clause under the penalty therein mentioned, the enactment is *intra vires* the Provincial Legislature. *Rex v. Pierce*, 374.

4. *Criminal Code, sec. 449 (b)—Trading or Trafficking in Bottles Having on them the Name of Another Person—Non-registration.*]—Section 449 (b) of the Criminal Code provides that any manufacturer, dealer, or trader or bottler, is guilty of an indictable offence, who, without the written consent of such other person, trades or traffics in any bottle or syphon which has upon it "the duly registered trade mark or name of any other person:"—

Held, that this enactment was violated by trading or trafficking in bottles having on them

the name of another person, though such name was not registered.

The section in the French version of the Code referred to. *Rex v. Irvine*, 389.

5. *Circulating Obscene Paper*—“*Knowingly*”—*Evidence of Knowledge*—Code, sec. 179.]—The prisoner, who distributed and circulated a printed paper containing statements set out in the report, was indicted in a County Judge’s Criminal Court, under sec. 179 (a) of the Criminal Code, 55 & 56 Vict. ch. 29 (D.), for unlawfully, knowingly, and without lawful justification or excuse distributing and circulating certain obscene printed matter tending to corrupt morals, contained in said paper, bearing the title, “To the Public,” “The Evil Exposed,” “The Plot against Prince Michael Revealed.” The County Judge found the offence proved as charged and reserved the following points for the opinion of the Court of Appeal—(1) Is the printed matter complained of obscene within the meaning of sec. 179 (a) of the Criminal Code? (2) Did the prisoner without lawful justification or excuse distribute or circulate such obscene printed matter?—

Held, that the word “obscene” is used in sec. 179 in the sense of conduct involving sexual immorality and indecency—offensive to modesty or decency—expressing or suggesting unchaste or lustful ideas, and that there were certain references

and allusions in the paper which warranted the County Judge in concluding that it was a document of obscenity within the meaning of the section.

Held, also, that the use of the word “knowingly” in the section made it incumbent on the prosecution to give some evidence of knowledge, and that here there was sufficient evidence to justify the County Judge’s finding that the accused was aware of the contents of the paper.

Judgment of the county court of Essex affirmed. *Rex v. Beaver*, 418.

6. *Jury—Inspection of Panel*—*R.S.O. 1897, ch. 61, sec. 94.*]—The restriction imposed by sec. 94 of the Jurors Act, R.S.O. 1897, ch. 61, upon the disclosure of the names of the jurors and inspection of the panel, applies in criminal proceedings.

Judgment of Street, J., affirmed, Osler, J. A., dissenting. *In re Chantler*, 529.

7. *Combination in Restraint of Trade—Conspiracy to Prevent or Lessen Competition*—*Criminal Code, sec. 520, sub-sec. (d); sec. 930—52 Vict. ch. 41, sec. 5 (D.)*]—Defendant was president and took an active interest in an association, one of the declared objects of which was the protection of its members, who were dealers in coal, against the shipment of coal direct to consumers by producers. It was also formed to prevent members, including any local organization who had be-

come members, from buying coal from any producer who sold direct to consumers or to dealers who refused to maintain prices as fixed. When notified no member was permitted to purchase coal of any producer, etc., who sold direct to a consumer in any place where there was a member of the organization, or who sold to dealers who refused to maintain prices. For violations of these provisions, a claim for 50 cents a ton might be made for coal so irregularly sold, and if allowed and not paid by the defaulting member, after notice, any member dealing with the defaulter was liable to be expelled from the association. All these provisions and others having the same object were embodied in the printed constitution and by-laws of the organization, which were in force up to the time of the trial.

Evidence was given of sales having been refused to dealers, not members of the association, for that reason, and that dealers could not become members as of right; that a list of members and non-members was published, the latter of whom were not allowed to purchase except at retail prices; and that the association was in effective and active operation according to its constitution and by-laws. By sec. 520, sub-sec. (d), of the Criminal Code, as amended, every one is guilty of an indictable offence, etc., who conspires, combines, agrees, or arranges with any other person. . . to unduly prevent or lessen com-

petition in the production, manufacture, purchase, barter or sale, transportation or supply, of any article or commodity which may be a subject of trade or commerce:—

Held, that the defendant was rightly convicted of an offence under the sub-section, the plain object of the association being to restrict and confine the sale of coal by retail to its own members, and to prevent any one else from obtaining it for that purpose from the operators and shippers.

Held, also, that, the offence being a continuing one, sec. 930 of the Code (if applicable to indictable offences), which limits the time for laying any information to within two years after the offence is committed, did not apply.

Held, finally, that a cross-appeal by the Crown did not lie, as sec. 5 of 52 Vict. ch. 41 (D.) only gives an appeal from a conviction. *Rex v. Elliott*, 648.

(*See also, ante*, CONTRACT, 2.)

See GAMING.

CROWN.

See SHERIFF.

DAMAGES.

See BROKER—CONTRACT, 3—
COSTS, 2—INFANT, 1—MASTER
AND SERVANT, 4.

DEED.

See LIMITATION OF ACTIONS, 2.

DEFAMATION.

Privilege—Privileged Statements Made at Public Meeting—Letter to Newspaper in Reply—Justification—Counterclaim.—Statements made at a public meeting by an alderman of a city, in his capacity as a member of a public library committee, reflecting on the manner in which the defendant, a contractor for the stone and mason work of a public library, was performing his contract, are *prima facie* privileged, and such privilege is not taken away by reason of there being present, to plaintiff's knowledge, newspaper reporters who, without any request from the plaintiff, published in their newspapers a report of what had taken place at the meeting, including the plaintiff's statements, and therefore did not constitute any justification for a letter written by defendant to such newspapers vindicating his character, and in which a defamatory attack was made on the plaintiff.

A counterclaim, referring to the charges in the statement of defence, and alleging that they were falsely and maliciously spoken by the plaintiff, was held to be a good pleading under Rule 268. *Hopewell v. Kennedy*, 43.

DEPUTY JUDGE.

See **PARLIAMENT**, 2.

DEVOLUTION OF ESTATES ACT.

Settlement—Remainder to Appointee under Will or in

Default to "Right Heirs"—Failure to Appoint—Equitable Estate—Vesting in Administratrix.—The owner in fee simple of certain land, by deed granted it to trustees upon trust to lease, and to pay rent to him for life, and after his death to convey it to such persons as he by his will should appoint, and in case of his death without a will "To hold the same in trust for the right heirs of (himself) according to the law of descent in Ontario in fee simple," and in the event of the rents not being sufficient for his maintenance, with his consent to sell it and apply the proceeds to his maintenance, etc., and died without making a will and without the land having been sold in his lifetime:—

Held, that the settlor was possessed of an equitable estate in fee simple in the land, which, on his death, vested in his administratrix under the Devolution of Estates Act. *Re Bower Trusts*, 199.

DISCONTINUANCE OF ACTION.

See **PRACTICE**, 1.

DISCOVERY.

1. *Examination of Person for whose Immediate Benefit Action Defended—Action against Assignee for Creditors—Examination of Assignor—Reference for Trial—Power of Referee to order Examination—Con. Rules 440, 466.*—This action being at issue all matters

were referred to be tried before a referee pursuant to sec. 29 of the Arbitration Act, R.S.O. 1897, ch. 62:—

Held, MEREDITH, J., dissenting, that the reference being before trial and the cause being referred or the purpose of trial, the referee had power to direct one who was a party, or one for whose immediate benefit the action was prosecuted or defended, to be examined for discovery.

The action was brought against an assignee for the benefit of creditors to establish the right of the plaintiff to rank upon the estate, which was in fact insolvent:—

Held, MEREDITH, J., dissenting, that the assignor was a person for whose immediate benefit the action was defended within the meaning of Rules 440 and 466, and was to be regarded as a party for the purpose of examination and discovery. *Garland v. Clarkson*, 281.

2. *Examination of Officer of Corporation—Rule 439 (2).*—Where a corporation is a party to an action, and discovery is sought, it is reasonable and convenient that the corporation should suggest for examination the officer or servant best qualified to give the desired information, who should prepare himself for obtaining knowledge of all relevant facts.

In an action to set aside a chattel mortgage brought against an incorporated bank, the examination of the general man-

ager and the inspector disclosing that they were not conversant with the facts, an order was made under Rule 439 (2) for the examination of the local manager, who was present when the mortgage in question was given. *Clarkson v. Bank of Hamilton*, 317.

3. *Examination of Officer of Society—Head Office and Local Office.*—An organization consisted of a head office called the "Head Camp" and a number of local branches called "subordinate camps," the Head Camp being composed of a delegate from each subordinate camp, and having eleven officers elected therefrom, while the subordinate camps had similar officers elected from their members, the Head Camp having absolute jurisdiction over all members. The members' dues were payable annually to the clerk of the subordinate camp, and handed to the banker, and remitted to the Head Camp, but no clerk or banker could be installed until they had given security to the satisfaction of the head managers of the Head Camp:—

Held, that the clerk of a subordinate camp was an officer of the organization, and therefore subject to examination for discovery. *Redhead v. Canadian Order of the Woodmen of the World*, 319.

DISMISSAL OF ACTION.

See JUDGMENT—SOLICITOR, 2.

DISMISSAL OF SERVANT.

See MASTER AND SERVANT, 5.

DIVISION COURTS.

Attachment of Debts—Jurisdiction—Garnishee out of Province—"Carrying on Business"—Assignee of Fund Attached—"Intervener."—A person living in the United States entered into a contract in Ontario for the building of a house upon land owned by his wife. It was shewn also that he acted as his wife's agent in affairs relating to this property and other property in Ontario, all situate within the territory of a certain division court, process from which was issued against him as garnishee:—

Held, that the evidence did not shew that he was carrying on business in the division, within the meaning of sec. 190 of the Division Courts Act, R.S.O. 1897, ch. 60.

Held, however, STREET, J., dissenting, that, as the garnishee had submitted to the jurisdiction of the division court, a person holding an equitable assignment from the primary debtor of a part of the fund sought to garnished could not effectively intervene under sec. 193 and defeat the garnishing proceedings by shewing that the Court had no jurisdiction over the garnishee. *Nelson et al. v. Lenz*, 50.

2. *Jurisdiction—Claim over \$100—Promissory Note—Indorser.*—Having regard to sec.

8, sub-sec. 24, of the Interpretation Act, the word "document" in sec. 1 of 4 Edw. VII. ch. 12, amending sec. 72 of the Division Courts Act, may be read, if necessary, in the plural, and therefore the increased jurisdiction of the division court may be exercised where the claim can be established by the production of one or more documents and the proof of the signatures to them.

Production of a promissory note and proof of the signature of the defendant as an indorser, and production of the protest setting out the facts of presentment and notice of dishonour, make out a *prima facie* case within the jurisdiction of the division court.

Judgment of Magee, J., reversed. *Slater v. Laberee*, 545.

3. *Judgment Inadvertently Entered for Wrong Person—Correction of—Prohibition.*—

In a division court action for \$70 the Judge, by a mere slip, so obvious that no one was misled by it, directed judgment to be entered for the defendant instead of the plaintiffs, and about three weeks afterwards, on his attention being called to it, the mistake was corrected in the presence of the solicitors who appeared for both parties at the trial. Immediately after the trial the defendant had an interview with his then solicitors, when he was advised that there would be no use in moving for a new trial. He then retained a new solicitor, and without, in

any way, communicating with his former solicitors, or making any application for a new trial, and, after the time therefor had elapsed, moved for prohibition:—

Held, that the application would not lie. *Re North American Life Assurance Co. v. Collins*, 579.

DIVISIONAL COURTS.

See COURT OF APPEAL.

ELECTIONS.

See CONTEMPT OF COURT—MUNICIPAL CORPORATIONS, 2—PARLIAMENT—PENALTIES.

ESTATE.

See DEVOLUTION OF ESTATES ACT—WILL.

EVIDENCE.

1. *Ex Parte Motion—Examination of Witness—Con. Rule 491.*]—Con. Rule 491 applies to an *ex parte* motion, and therefore a witness may be examined in support of such a motion. *Dunlop v. Dunlop*, 372.

2. *Foreign Commission—Interrogatories.*]—There is no power at the instance of the opposite party to strike out or modify interrogatories prepared by the party who has obtained an order for a foreign commission. He may frame them as he pleases, taking the risk of the evidence being rejected in

whole or in part by the Judge at the trial. *Toronto Industrial Exhibition Association v. Houston*, 527.

Evidence Taken at Previous Trial and on Reference—Admissibility.]—*See* *Monro v. Toronto R. W. Co.*, 299, *post*, INFANT, 1.

See CRIMINAL LAW, 1, 2, 5 — DISCOVERY — INFANT, 1 — MASTER AND SERVANT, 1, 2.

EXAMINATION.

See DISCOVERY—EVIDENCE.

EXECUTORS AND ADMINISTRATORS.

See DEVOLUTION OF ESTATES ACT—WILL, 1.

FACTORIES ACT.

See MASTER AND SERVANT, 2.

FIRE INSURANCE.

See INSURANCE.

FOREIGN COMMISSION.

See EVIDENCE, 2.

FOREIGN UNINCORPORATED ASSOCIATION.

See PARTIES.

FRAUD.

See COSTS, 1.

GAMING.

*Municipal By-law—Gambling in Private House—Conviction Quashed—R.S.O. 1897, ch. 223, sec. 549 (4).—*A municipal by-law provided that no person should permit any game of chance or hazard with cards to be played for money, within any house, purporting to be founded upon sec. 549 (4) of the Municipal Act, empowering municipalities to pass by-laws for suppressing gambling houses. On an information under this by-law, the evidence shewed that the defendant's friends used to come to visit him in his private house on Sundays, and there sometimes play poker for money, and that they did so on the occasion in question; but there was no evidence that the house was of the character of a "gambling house."—

Held, that the section is pointed at houses where gaming or gambling is practised, and the house kept for such purpose; and that the by-law was therefore *ultra vires*, and the conviction of the defendant under it must be quashed. *Rex v. Spelman*, 75.

GUARANTY.

See PRINCIPAL AND SURETY.

HIGHWAY.

See WAY.

HUSBAND AND WIFE.

See JUDGMENT—LIMITATION OF ACTIONS, 1.

INFANT.

1. *Lease—Repudiation—Settled Estates Act—Tenants in Common—Ouster—Waste—Partition Deed—Validity—Reformation of—Damages—Evidence.*—The plaintiff, while an infant, joined with his father, the life tenant of certain property, and with his adult brother and sister (who with himself took the reversionary estate) in a lease thereof to the defendants, a railway company, under the Short Forms Act, for ten years, in which the lessors were not to be liable in case of repudiation by the plaintiff on his attaining his majority. The lease did not provide, as required by the Settled Estates Act, that it was made without impeachment of waste, nor that any timber or trees would not be cut down, except in the ordinary course of husbandry, while it permitted trees to be cut down for the use of the property as a pleasure ground, but which were, unless absolutely necessary for certain construction purposes, not to exceed five inches in diameter. It also contained the ordinary covenant to repair. The company pulled down some buildings on the property, made roads and paths through it, erected pavilions, and ran their railway into it, whereby large crowds were brought there. On the father's death, the plaintiff, having attained his majority, repudiated the lease, and with his brother and sister effected a partition of the property, to which the company were not

parties, the plaintiff being assigned the central one-third, and the brother and sister the easterly and westerly one-thirds respectively, the deeds purporting to make a division of the entire estate and to absolutely vest in the parties thereto their respective properties:—

Held, affirming the judgment of TEETZEL, J., at the trial, that the defendants were guilty of ouster in that they had practically excluded the plaintiff from possession, and he was therefore entitled to mesne profits since he became of age, and that they were also guilty of active or commissive waste in pulling down and removing the buildings, and in cutting down trees and shrubs, and that he was entitled to damages therefor, but that they were not liable for scouring or wearing away the banks on the lake front, for this was at most permissive waste, for which neither a tenant for life nor a tenant in common was responsible; that as regards partition, the intention of the parties thereto was for a division of their reversionary interests only, after the expiration of the lease, and not for an immediate partition, and the plaintiff, therefore, was entitled to have the deeds reformed so as to carry out such intention, but that during the course of the lease the more equitable partition would be to give the plaintiff the easterly one-third portion, and the company the remainder.

Evidence taken at a previous trial when the action was di-

rected to stand adjourned to add parties and amend pleadings, and before the Master under a reference, was, under the circumstances, held not to be admissible.

Per TEETZEL, J., the lease did not come within the Settled Estates Act so as to be binding on the plaintiff thereunder. *Monro v. Toronto R. W. Co. et al.*, 299.

2. *Maintenance—Contingent Legacies—Interest as Maintenance.*—A testator bequeathed to his two infant sons \$4,000 each, contingent upon their attaining 25 years of age; the only other provision for them was a gift to each of one-tenth of the residuary estate:—

Held, affirming the decision of Street, J., reported 7 O.L.R. 548, that these legacies carried interest from the death of the testator, and that a certain sum should be paid annually out of such interest to their mother for the purposes of their maintenance, and the executors should set apart the full amount of \$8,000 to provide for the payment of such legacies at the time provided, but that the question of the proper amount to be allowed, having regard to the income from the infants' shares in the residue, should be now settled by the Master unless otherwise agreed upon.

In such cases the amount to be allowed for maintenance must be governed by a consideration of the other circumstances, and a due regard to such other sources or funds as may be properly resorted to for such pur-

pose. *Re McIntyre, McIntyre v. London and Western Trusts Co. et al.*, 408.

See COSTS, 4.

INSPECTION OF JURORS' PANEL.

See CRIMINAL LAW, 6.

INSPECTOR.

See COMPANY, 3.

INSURANCE.

1. *Fire Insurance — Parol Contract — Interim Receipt Limiting Duration of Contract — Effect of — Incumbrance — Omission to Notify Company — Absence of Written Application with Questions and Answers — Materiality.*]—The plaintiffs on the 7th November, 1901, applied through an agent of the defendants to their general manager for an insurance of \$2,800 for a year on certain machinery and stock in trade, which he verbally accepted, and the usual interim receipt was issued, by its terms limiting the insurance to thirty days, but of such limitation no notice in writing was given to the plaintiffs. On the 30th November the plaintiffs, in the belief that the insurance was for a year, paid the annual premium to the agent, who, according to his usual course, paid it over to the defendants in January following, when it was duly accepted by

the defendants. No policy, however, was issued, and a fire subsequently occurring some ten months after, whereby the goods were destroyed, the defendants repudiated liability on the ground that the insurance was for thirty days only:—

Held, that there was a valid parol contract for insurance for a year, and that nothing subsequently took place to modify or impair it, the interim receipt under the circumstances not having such effect.

Held, also, that under the parol contract such an implication was raised that a proper policy would be issued subject to the statutory conditions and such variations thereof as were just and reasonable, and that was substantially the effect of the interim receipt, which, though ineffective to restrict the duration of the contract, was to be looked at as part of the evidence surrounding it.

Under the first statutory condition the applicant for insurance is not to misrepresent or omit to communicate any circumstances material to be made known to the company to enable it to judge of the risk, while a variation thereof on the company's policies required the applicant to communicate the existence of a mortgage or other incumbrance and the amount thereof, and it was objected that the applicant had omitted to communicate the existence of a mortgage on the insured property whereby the insurance was vitiated:—

Held, that whether the first statutory condition was alone considered or the variation thereof, which was in effect the same, the object was to obtain information as to the risk before accepting it, which information is usually obtained by questions and answers in a written application, and as there was no such application here and no question put at all, either written or verbal, there was no duty imposed on the assured to communicate the fact of the existence of the mortgage; and *semble*, the existence of the mortgage was not, in the circumstances of this case, a fact material to be made known to the company.

Judgment of MEREDITH, C.J. C.P., 7 O.L.R. 180, affirmed. *Coulter v. Equity Fire Insurance Co.*, 35.

2. *Fire Insurance—Goods in Existence at Time of Fire*—"120 Sacks of Green Coffee"—*Termination of Insurance—Notice of—Variation in Limitation Condition—Unreasonableness.*] Where a policy of insurance against fire was effected by the owners, wholesale dealers in coffee, etc., on "120 sacks of green coffee" stored in a specified warehouse, which policy was a renewal of a similar insurance in force for some years:—

Held, that such insurance was not limited to the particular 120 sacks on hand when the policy was effected, but covered similar stock to the specified

number of sacks in hand at the time of a fire which subsequently occurred.

About a week before the fire occurred the insured wrote to the company's local agent that they decided to cancel the existing policy and to have a new one issued for a reduced amount, but this was never communicated to the head office, or any action taken upon it until after the fire had occurred:—

Held, that this was not such written notice terminating the insurance as was required by 19a of the statutory conditions, being merely an intimation of the insured to have the existing policy cancelled when a new one was substituted for it, but which was never carried out.

A variation of statutory condition 22 reducing the time for bringing an action to six months is an unjust and unreasonable condition. *Merchants Fire Insurance Co. v. Equity Fire Insurance Co.*, 241.

3. *Fire Insurance—Oral Application—Ownership of Goods Insured—Lessees—Notice to Agents—Policy Differing from Application—Statutory Conditions 2, 10.*]—The plaintiffs, having an insurable interest, as lessees, in machinery, applied verbally to the defendants' agents for insurance, to whom they communicated the state of the title, the name of the owners, and the nature of their interest in the machines. The agents had authority to accept the risk, receive the pre-

mium, and issue an interim receipt, which they did. They also partly filled up an application form, not containing any statement as to the nature of the ownership, and signed it in the name of the plaintiffs, but without the knowledge, consent, or authority of the latter. A policy was issued and sent to the plaintiffs, which contained the statement that "the property is being held by the assured as owners."

Statutory conditions 10 provides that the company is not liable for loss of property owned by any other party than the assured, unless the interest of the assured is stated in or upon the policy:—

Held, that the plaintiffs were not precluded from recovery by this condition, inasmuch as the defendants had notice through their agents of the real interest of the plaintiffs, and it was their duty to have indorsed on the policy the necessary statement as to it, or at all events they were estopped from setting up the condition.

Held, also, that the plaintiffs could invoke the 2nd statutory condition, under which, after application for insurance, it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application, unless the company points out in writing the particulars wherein the policy differs from the application. There is no reason for confining the operation of this condition

to a written application. *Davidson v. Waterloo Mutual Fire Insurance Co.*, 394.

4. *Fire Insurance — Standing Timber — "Property."* — The defendants, an insurance company incorporated under the laws of Ontario, insured the plaintiffs, a railway company having a branch line in the State of Maine, "against loss or damage by fire . . . on property as follows: on all claims for loss or damage caused by locomotives to property located in the State of Maine, not including that of the assured." By the statute law of the State of Maine, where "property" is injured by fire communicated by a locomotive engine, the railway company is made responsible, and it is declared to have an insurable interest in the property along its line for which it is responsible:—

Held, that the policy in question was, in consequence of this statutory provision, a valid policy of fire insurance, and not an *ultra vires* policy of indemnity, but that the property in respect of which the insurance attached was that defined by the enabling section of the Ontario Insurance Act (R.S.O. 1897, ch. 203, sec. 166), and that standing timber was not included. *Canadian Pacific R.W. Co. v. Ottawa Fire Insurance Co.*, 493.

5. *Fire Insurance — Variations to the Statutory Conditions — "Just and Reasonable" — Material to the Risk — Incumbrances — Notice to Local*

Agent.—A policy provided, by way of variation of statutory condition 1, that any incumbrance by way of mortgage should be deemed material to be known to the company within the meaning of the said statutory condition:—

Held, that this was too wide to be just or reasonable, and that the Court had to determine whether the non-disclosure of the mortgage was a material fact, the onus being on the defendants, who asserted its materiality.

By another variation of the statutory conditions it was provided that the words “or its local agent,” in the 3rd statutory condition, which provides that any change material to the risk must be notified in writing “to the company or its local agent,” were struck out, and that wherever the words “agent” or “authorized agent” occurred elsewhere in the statutory conditions, such “agent” or “authorized agent” should be held to mean the company’s secretary only:—

Held, where a company had its head office in Ontario, a valid variation, since it was not unjust or unreasonable to stipulate that notice of important changes in the character of the risk should be communicated to the head office.

Where, in a policy, variations from the statutory conditions were printed in type of the same size and shape as the statutory conditions, but in bright scarlet,

whereas the latter were in black ink:—

Held, that the requirements of sec. 169 of the Ontario Insurance Act, R.S.O. 1897, ch. 203, were sufficiently complied with. *Lount v. London Mutual Fire Insurance Co.*, 549.

(See the next case.)

6. *Fire Insurance — Variations from Statutory Conditions — Notice to Agent*—R.S.O. 1897, ch. 203, sec. 168, clauses 3 and 23.]—A variation from the fire statutory conditions striking out from the third condition the words “or its local agent” in the clause requiring notice of a change material to the risk to be given to “the company or its local agent,” and providing that wherever the words “agent” or “authorized agent” occur in the statutory conditions such agent or authorized agent shall be held to mean the company’s secretary only, was, in the case of a company having its head office in the Province of Ontario and more than four hundred local agents in the Province, held, as to the 3rd statutory condition, to be just and reasonable, and notice to a local agent insufficient.

Judgment of Street, J., 9 O.L.R. 549 (*ante* 4), affirmed. *Lount v. London Mutual Fire Insurance Co.*, 699.

7. *Life Insurance — Benefit Certificate — Designation of Beneficiary*—Trust for “Legal Heirs” — Preferred Beneficiaries — Revocation.] — By its beneficiary certificate, bearing

date the 12th September, 1901, a benevolent society agreed to pay \$2,000 to the beneficiary or beneficiaries designated on the certificate, power of revocation and substitution being reserved to the member. By an indorsement made in the same month the member directed that payment should be made to three named persons, "executors in trust for legal heirs," reserving power of revocation and substitution. Two years later the member, by instrument in writing identifying the certificate, directed that the moneys payable under it should be paid to his daughter-in-law, and by his will, made about the same time, he also assumed to dispose of the moneys in her favour. The member died in May, 1904, leaving him surviving a grandson, the daughter-in-law, and several brothers and sisters:—

Held, that a designation of "legal heirs" as beneficiaries, although these legal heirs may in fact be members of the preferred class of beneficiaries, does not come within sub-sec. 1 of sec. 159 of the Insurance Act; that the declaration was revocable, and had been revoked; and that the grandson, who claimed as "legal heir," was not entitled to the fund. *In re Farley*, 517.

8. *Life Insurance—Application for—Withdrawal before Acceptance—Contract—Recovery of Premium.*]—The plaintiff signed an application to

the defendant company for an insurance on his life and paid the first year's premium. In the premium receipt the following words were printed: "The insurance will be in force from the date of approval of the application by the medical director," and the application contained statements of the payment of the premium, and that a receipt had been furnished "to make the insurance . . . binding from the date of approval by the company's medical director," and that the contract should not take effect until accepted by the head office. Before the approval of the application by the medical director the plaintiff withdrew the application:—

Held, that what took place was a mere offer of a risk on the plaintiff's life and that he was entitled to withdraw it and to recover the premium paid.

Judgment of the county court of Wentworth affirmed. *Henderson v. State Life Insurance Co.*, 540.

9. *Life Insurance—Thirty Days' Grace—Condition as to Payment of Premium within—Estoppel—Beneficiary—Insurance Act, R.S.O. 1897, ch. 203, sec. 148 (1).*]—An insurance for \$4,000 in the defendant company effected on the life of the plaintiff's husband and payable to her, was some time afterwards, in consideration of an annuity of \$1,500, made payable to her, assigned by her to her husband with a proviso that if he predeceased her, such

annuity was to be a charge on the proceeds. By one of the conditions thirty days' grace for payment of a premium was allowed, if the insured were unable to do so when it became due, which the plaintiff stated was the fact, while by sec. 148 (1) of the Insurance Act, R.S.O. 1897, ch. 203, payment of any premium, not being an initial premium, might be made, within thirty days after becoming due, by the insured or her beneficiary under the contract, when it would *ipso facto* be revived or renewed, any stipulation to the contrary notwithstanding. The insured died about ten days after a premium had become due, leaving it unpaid. A firm of solicitors, acting for the insured's family, at once notified the company of the death, and not knowing whether or not the premium had been paid, but, thinking that payment might have been overlooked, asked the company, if it had not, to advise them, and they would pay it. Subsequently, on the same day, the plaintiff called at the head office and saw the secretary, who, with full knowledge of the fact of such non-payment, stated, in answer to her inquiry, that the policy was all right, so far as he knew. The solicitors' letter had been handed over to the company's solicitor with instructions to answer it, which he did, by merely asking them to send in proofs of loss, and that the matter would receive prompt attention, making no answer to

the inquiry as to non-payment. Administration was taken out by the plaintiff and proofs duly furnished, and it was not until some months afterwards, on the solicitors' inquiring when the amount of the policy would be paid, that they were informed that the company contested payment for non-payment of the premium:—

Held, that the plaintiff was a beneficiary under the contract and entitled to make a claim under the policy; and that the company were estopped by their conduct from setting up the non-payment of the premium. *Tattersall v. People's Life Insurance Co.*, 611.

See PRINCIPAL AND SURETY.

INTEREST.

See INFANT, 2.

INTERROGATORIES.

See EVIDENCE, 2.

INTOXICATING LIQUORS.

1. *Searching for Liquor—Absence of Warrant—Private Dwelling House—County Constable—Notice of Action—Bona fides—Leave and License.*]—Defendant, a county constable, appointed by a police magistrate, searched the plaintiff's dwelling house for liquor without a warrant and without any special authority.

In an action for trespass the trial Judge held that the defendant was acting in the discharge of his duty, and, there being no evidence of malice, that he was entitled to notice of action, and withdrew the case from the jury and directed a nonsuit :—

Held, that the question as to whether the defendant was acting *bona fide* in the discharge of his duty as a constable in searching a private house, as being a house of public entertainment, for liquor, was a question for the jury : and that leave and license, which was argued on the appeal but not pleaded, should also, if pleaded, be submitted to the jury; and the judgment dismissing the action was set aside and a new trial ordered with liberty to the defendant to amend by adding a plea of leave and license.

Judgment of the county court of Hastings reversed. *Bell v. Lott*, 114.

2. *Recovery of Payment for Liquor Illegally Sold—Holding License as Trustee—Liquor License Act—R.S.O. 1897, ch. 245, secs. 16, 49 (1), 51, 64 (1), (2), 126—62 Vict. (2) ch. 31, secs. 4, 30—Penalty.*]—The defendants, having become possessed of the goodwill of a liquor business theretofore carried on by an insolvent, who was indebted to them, and of the chattel property on the premises whereon the business had been carried on, sold them to the plaintiff for \$1,200, it being

agreed that the license should be taken out in the name of the defendants' manager, as was in fact done, to be held and controlled by him for the purpose of securing the purchase money. The defendants also obtained a lease of the premises, and supplied the plaintiff with liquor to carry on, which he resold in the course of, his business, they debiting him with the price of the liquor and with the rent :—

Held, that the plaintiff was entitled to recover moneys paid by him to the defendants for liquor so supplied, under sec. 126 of the Liquor License Act, R.S.O. 1897, ch. 245, as furnished in contravention of that Act, and especially of sec. 64 (1), prohibiting such sales to unlicensed persons for the purpose of the latter re-selling, and this though the defendants were brewers duly licensed by the Government of Canada for the manufacture of liquor and also held a Provincial brewer's license.

The granting of a license to one who has no interest in the business, and is not an occupant of the premises in which it is carried on, in trust for another, who is the true owner of the business and the occupant of the premises, is not a thing permissible under the Act.

Held, also, that the defendants were not entitled to recover, by way of counterclaim, on notes given by the plaintiff for liquor supplied under the above circumstances, but that there being no scheme

of any kind to evade the Act in the arrangement made, the defendants were entitled to recover the rent of the premises and money paid for the plaintiff.

Waugh v. Morris (1875), L.R. 8 Q.B. 202, specially referred to.

Held, further, that the liability invoked by the plaintiff was not a penalty imposed upon the defendants within the meaning of R.S.O. 1897, ch. 108, and could not be relieved against under that Act. *Boucher v. Capital Brewing Company, Limited*, 266.

JUDGMENT.

Summary Judgment — Breach of Promise of Marriage — Evidence of Breach — Motion to Dismiss Action — Con. Rule 616.]—A motion by defendant, under Con. Rule 616, to dismiss an action for breach of promise of marriage, on the ground that the statement of claim did not allege a breach, and that the plaintiff on examination for discovery had admitted that there was no breach before action, was refused, the question whether there was such a breach or not being, in all the circumstances of the case, for the jury. *Barnum v. Henry*, 319.

See DIVISION COURTS, 3.

JURY.

See CRIMINAL LAW, 2, 6—RAILWAY, 3, TRIAL 3.

LACHES.

See BROKER.

LANDLORD AND TENANT.

1. *Lease—Short Forms Act—Covenant—Covenant to Repair—Variation from Statutory Form—R.S.O. 1887, ch. 106, Covenant 8.*]—An indenture of lease, bearing date the 29th June, 1891, expressed to be made in pursuance of the Act then in force respecting Short Forms of Leases (R.S.O. 1887, ch. 106), contained a covenant by the lessees that they would “leave the premises in good repair, *ordinary wear and tear excepted*,” the words in italics not being in the statutory short form, and the extended statutory equivalent of the short form having in it the exception “reasonable wear and tear *and damage by fire only excepted*.”—

Held, Magee, J., dissenting, that the added words were not an exception to or qualification of the short form, within the meaning of the Act; that the covenant had to be construed as it stood without the aid of the extended form; and therefore that the exception as to damage by fire did not apply.

Judgment of Boyd, C., affirmed. *Delamatter v. Brown Brothers Co.*, 351.

2. *Overholding Tenants Act—Alterations in Lease—Summary Adjudication.*]—Under the Overholding Tenants Act, as now amended, R.S.O. 1897, ch. 171, it is the duty of the

Judge, upon an application for possession, if he is satisfied that the case made out by the landlord is a clear one upon both the facts and the law, to exercise the summary power conferred upon him; but if his conclusion is that the case is a doubtful one either upon the facts or the law, then he should leave the parties to proceed in the ordinary course to determine the matters in dispute between them.

In such proceedings the Judge has power to determine summarily such a question as the validity of alterations appearing in the copy of the lease in question produced by the tenant, although there is a direct conflict of testimony as to the time when and the person by whom the alterations were made.

Order of MACMAHON, J., affirmed. *In re Lumbers and Howard*, 680.

See LIMITATION OF ACTIONS, 3—NEGLIGENCE, 1.

LEASE.

See INFANT, 1—LANDLORD AND TENANT.

LEAVE AND LICENSE.

See INTOXICATING LIQUORS, 1.

LEAVE TO APPEAL.

See COURT OF APPEAL.

LIBEL.

See DEFAMATION.

LIFE ESTATE.

See WILL, 3.

LIFE INSURANCE.

See INSURANCE.

LIMITATION OF ACTIONS.

1. *Promissory Note — Part Payment—Husband and Wife —Payment by Husband out of Wife's Moneys—Evidence of.*]

A husband, who had authority from his wife to collect rents for her, and to apply the same as he saw fit, either for his own or her benefit, made payments on the joint promissory note of himself and his wife, but there was nothing to shew any specific application of any part of the moneys collected on the note, or her knowledge or consent:—

Held, that such payments could not be treated as part payments by the wife on the note, so as to operate as a bar to the running of the Statute of Limitations. *Harris v. Greenwood*, 25.

2. *Title by Possession—Registry Act — Notice — Mortgage—Avoidance of Prior Unregistered Deed—Relation back to Date of Deed.*]

In 1891 the defendant wife, being desirous of conveying to the other defendant, in contemplation of her then intended marriage with him, an interest in certain land owned by her, conveyed the land in fee simple to one S., who then conveyed to her and her intended husband in fee simple as tenants

in common. S. duly registered the deed to himself, but fraudulently omitted to register his deed to the defendants, who then were and continued to be down to the time of the bringing of the action in actual possession of the land. S., after previously mortgaging the land to other persons, mortgaged it in 1895 to the plaintiffs, who registered their mortgage in good faith, the previous mortgage having been paid off. The fraud was not discovered till 1902, and in 1903 the plaintiffs brought this action to enforce their mortgage:—

Held, that the avoidance by virtue of the Registry Act of the prior unregistered deed to the defendants related back to the time of its execution; that from the time of the execution of the deed by the wife to S. the legal title was in him, and that the statute then began to run against him; that the mortgage by him in 1895 to the plaintiffs did not give a new starting point to the statute as against the defendants; and therefore that the action was barred.

Judgment of Boyd, C., reversed.

Cameron v. Walker (1890), 19 O.R. 212, must, in view of the decision to the contrary of the Court of Appeal in *Thorn-ton v. France*, [1897] 2 Q.B. 143, be regarded as no longer of authority.

Stephen v. Simpson (1869), 15 Gr. 594, specially referred to. *McVity v. Trenouth*, 105.

3. *Landlord and Tenant—Payment of Taxes by Tenant.*]

—The lessee of a house at a yearly rental without taxes agreed with the lessor, after he had been in possession of the house for some time, to pay the municipal taxes and water rates chargeable in respect of the house, on the understanding that the amount would be deducted from the rent payable by him. He remained in possession of the house for more than eleven years prior to the time of the bringing of the action, having paid the taxes and water rates each year to the municipal authorities, but not having made any payments to the lessor:—

In an action for foreclosure by a mortgagee of the lessor under a mortgage made subsequent to the lease, it was held that, even assuming that the agreement had been intended to relate to future years (which was doubtful), the payments of taxes and water rates did not operate to prevent the bar of the statute.

Finch v. Gilray (1889), 16 A.R. 484, applied. *Brennan v. Finley*, 131.

LIQUIDATOR.

See COMPANY, 3.

LIQUOR LICENSE ACT.

See INTOXICATING LIQUORS.

LOAN COMPANY.

See COMPANY, 4.

LOAN CORPORATIONS ACT.

See CRIMINAL LAW, 3.

LONDON STREET RAILWAY COMPANY.

See STREET RAILWAYS, 2.

MAINTENANCE.

See SOLICITOR, 1.

MAINTENANCE OF INFANTS.

See INFANT, 2.

MALICIOUS PROSECUTION.

Proof of Favourable Termination of Prosecution—Informal Abandonment—Findings of Jury.—In an action for malicious prosecution it appeared that warrants were issued, the plaintiff arrested, and put under bail to appear, on a charge of arson, and eleven witnesses for the prosecution summoned, but that, before the day fixed for hearing, the prosecutrix obtained information leading her to believe that the plaintiff was not guilty; that the magistrate, who had since died, gave some instructions or other to the chief constable; and that in the result no witnesses appeared, the proceedings were in some way stopped, and the prosecutrix or her mother paid the fees, and nothing more was heard of the case:—

Held, MEREDITH, J., dissenting, that enough had been shewn to justify the assumption that

the prosecution had terminated favourably to the accused, before the action was brought. *Beemer v. Beemer*, 69.

MANDAMUS.

See COMPANY, 1.

MARRIAGE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1.

MASTER AND SERVANT.

1. *Injury to Servant—Negligence—Defect in Machinery—Conflict of Opinion as to Type—Defective System of Inspection—Workmen's Compensation Act, sec. 3, sub-sec. 1, sec. 6, sub-sec. 1.*—In an action brought against a railway company to recover damages because of the death of a fireman who was scalded by steam which escaped in consequence of the giving way of a water-pipe in an engine, evidence was given on behalf of the plaintiff that the type of engine in question was of dangerous construction and especially liable to accidents of the kind, but it was shewn on cross-examination of the plaintiff's witnesses that the use of engines of this type was well established and that they had many points in their favour:—

Held, that the principle adopted in actions of negligence against professional men should be applied, namely, that negligence cannot be found where

the opinion evidence is in conflict and reputable skilled men have approved of the method called in question.

At common law a master is bound to provide proper appliances for the carrying on of his work, and to take reasonable care that appliances which if out of order will cause danger to his servant are in such a condition that the servant may use them without incurring unnecessary danger. These duties he may discharge either personally or by employing a competent person in his stead, and the purpose of sub-sec. 1 of sec. 3 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, as modified by sec. 6, sub-sec. 1, is to take from the master his common law immunity for the neglect of such a person.

Where therefore an accident occurred as the result of the giving way of a water pipe in an engine which had not long before been in the defendants' repair shop for the purpose of having the water pipes repaired, it was held that the inference might be drawn that there had been negligence on the part of the workman intrusted with the duty of making the repairs, and either absence of inspection or negligent inspection, and that if an inference of either kind were drawn the defendants would be liable.

A nonsuit granted by Meredith, J., was therefore set aside and a new trial ordered. *Schwoob v. Michigan Central R. W. Co.*, 86.

2. *Injury to Servant—Negligence—Cause of Accident—Evidence—Factories Act, R.S.O. 1897, ch. 256, sec. 20.*—An employee in a paper mill received injuries from a defective and unguarded elevator which subsequently caused his death.

At the trial of an action by the administrator of his estate against the owners of the mill, it was shewn that the approach to the elevator shaft was unguarded, and that the elevator was defectively constructed in that it had no safety catch, or other safeguard, as required by the Factories Act, R.S.O. 1897, ch. 256, sec. 20 (c) (d):—

Held, that the defendant company was liable, notwithstanding that there was no direct evidence of how the deceased was injured.

Kervin v. Canadian Coloured Cotton Mills Co. (1896), 28 O.R. 73, distinguished.

Groves v. Wimborne, [1898] 2 Q.B. 402, followed. *Wilson v. Lincoln Paper Mills Manufacturing Co.*, 119.

3. *Negligence of Servant—Injury to Third Person—Scope of Employment.*—A watchman was employed by the defendants to lower bars or gates across the highway at each side of a crossing on the approach of trains, and to raise them as soon as the trains had passed, the gates being lowered and raised by means of a lever which was some distance from them. While a train was passing and the gates down, the plaintiff, a lad of six-

teen, and two other lads, climbed or leaned upon one of the gates, and the watchman was prevented by their weight from raising the gates after the train had passed. In order to get them off he threw a cinder towards them, which struck the plaintiff in the eye, destroying the sight:—

Held, that, the act having been done not of mere malice or ill-will or to punish the plaintiff, but for the purpose of warning him to get off the gate, and so of enabling the watchman to perform the duty required of him, the defendants, his employers, were responsible in damages. *Hammond v. Grand Trunk R. W. Co.*, 64.

4. *Servant Engaging in Other Business—Right of Master to Profits—Contract for Exclusive Service—Damages.*—A servant who enters into a contract to devote his entire time and attention to the interests of his master, and to engage in no other business, is liable in damages for the breach of that contract: but if he does work in a different capacity, and does not use time which should be devoted to his master's business, or engage in competitive undertakings, he is not liable to pay to his master the earnings or profits received by him in respect of such work.

But no servant can be permitted to retain as against his employer profits acquired by engaging, during his term of employment, without his mas-

ter's consent, in any business which gives him an interest conflicting with his duty to that employer.

Judgment of Idington, J., varied. *Sheppard Publishing Co. v. Harkins*, 504.

5. *Wrongful Dismissal—Writing Solicitor's Letter—Imperfect Workmanship—Isolated Act of Negligence.*—The plaintiff entered into a written agreement to serve the defendants, who were wholesale manufacturing jewellers, as a "general mounter," which agreement provided that the defendants might dismiss him instantly "if guilty of disobedience to orders, theft, drunkenness, or other misconduct."

The plaintiff, after being in the defendants' service for some months, was instructed to do a particular piece of work, and did it so imperfectly that it was found unmerchantable, and the defendants told him he would have to make it over again "in his own time." He took 12 hours to make it over, and the defendants' manager fined him \$1.45, the equivalent of 6 hours' time. The plaintiff went to a solicitor, who wrote the defendants a courteous letter, demanding payment of the \$1.45, which letter the defendants asked the plaintiff to withdraw, and, on his refusal, paid him the \$1.45, but instantly dismissed him:—

Held, that complaining through his solicitor was not disobedience to orders or other

misconduct within the meaning of the agreement, and the plaintiff was entitled to judgment. *Clark v. Capp*, 192.

MORTGAGE.

Sale on Credit—Account of Proceeds—Removal of Building from Mortgaged Property—Subsequent Action on Covenant.]—A mortgagee who without special power to that effect sells the mortgaged property on credit, is chargeable with the purchase price as if it had been received by him in cash.

The principle that a mortgagee cannot sue the mortgagor on his covenant unless he is in a position to reconvey the mortgaged property to him intact does not apply to the case where the mortgagee is in a position to restore the whole of the mortgaged land, but owing to the removal or destruction of a building on the mortgaged land the property is not in the condition in which it was when the mortgagee took possession, unless, *semble*, the building is of such a character that compensation in money, which the mortgagor is in such an event entitled to, would not be an adequate indemnity.

In re Thuresson (1902), 3 O.L.R. 271, distinguished.

Judgment of ANGLIN, J., reversed. *Mendels v. Gibson*, 94.

See LIMITATION OF ACTIONS, 2.

MUNICIPAL CORPORATIONS.

1. *Contract — By-law — Variation in Detail—Necessity for Further By-law.*]—A contract for the performance of work for a municipal corporation executed under its corporate seal by virtue of a by-law passed therefor can be varied in an unimportant matter of detail, e.g., a modification in the mode of payment, without the necessity of passing a further by-law.

Where, therefore, a contract with a city for supplying dynamos and station systems for electric street lighting was, under the authority of a by-law, executed under the corporate seal, payment to be made on the approval of an engineer, who duly inspected and approved of the work subject only to re-armaturing, if such should be found necessary, within five years, it being arranged that a portion of the contract price should be retained as a guarantee therefor:—

Held, that the variation was effective without a further by-law being passed authorizing it. *Thompson v. City of Chatham*, 343.

2. *Councillor Elected While Member of School Board—Disqualification.*]—The respondent, having been elected in January, 1903, as school trustee for two years, took the oath of office on the 21st January, 1903. On the 26th December, 1904, he was nominated as councillor and school trustee, but next day filed with the secretary of the school board a memorandum in

these words: "I hereby tender my resignation as candidate for trustee for 1905." He took the oath of qualification as councillor on the 27th December, 1904, made his declaration of office as such on the 9th January, 1905, and took his seat in the council. The first meeting of the new school board, when the same was organized, was held on the 18th January, 1905:—

Held, that the election of the respondent as councillor must be set aside.

Rex ex rel. Zimmerman v. Steele (1903), 5 O.L.R. 565, followed. *Rex ex rel. Jamieson v. Cook*, 466.

3. *Bonus to Manufacturing Industry — Motion to Quash By-law — Private Interest — Narrowing Street on Registered Plan*—3 *Edw. VII. ch. 19, secs. 591, sub-sec. 12, 632*—4 *Edw. VII. ch. 22, sec. 26*.]—A municipal by-law provided for closing part of a public street and conveying the same to a manufacturing company by way of bonus for the promotion of their business and of an intended enlargement of their works. No contract by the company to add to their works or increase their business, or employ additional men, had been entered into:—

Held, that this fact did not invalidate the by-law or prove that it was passed solely in the private interest of the company and not also in the public interest.

The fact that a municipal council in serving the interest of

the public are at the same time serving that of the grantee of the bonus, is not an objection to such by-law.

Held, also, that the fact that the applicant to quash had bought his land under a registered plan which shewed the street to have a width of eighty feet, did not prevent the municipality passing a by-law, although by it the width of the street was reduced at the part affected to sixty-six feet. *In re Inglis and City of Toronto*, 562.

4. *Trustees—Lands Acquired at Tax Sale—Sale of—Accepting Lower Tenders for—New Trial*.]—A municipal corporation occupies, as regards corporate property, the position of a trustee, and is amenable to the like jurisdiction of the Courts as is exercised over trustees generally.

A number of lots, which had been acquired by the corporation of a city for arrears of taxes, were directed to be sold, and where offers should be less than the amount for which they had been acquired and the subsequent taxes, such offers were to be dealt with by a committee composed of the mayor, one of the aldermen, and the treasurer. Against the protests of the mayor, the other two members of the committee accepted an offer for a less amount than the mayor stated could be obtained therefor from the plaintiff, and on the matter being brought before the council it was decided to ask for tenders. This was

accordingly done, and tenders put in by the alleged purchaser and the plaintiff, the plaintiff's being the higher one, but the council, notwithstanding, rejected it, accepting the lower one:—

Held, Meredith, J., dissenting, that, under the circumstances, the alleged sale could not be supported, and that the sale should have been to the plaintiff; but if the corporation desired an opportunity of shewing any good reasons for their action in the matter, there might be a further trial on that point. *Phillips v. City of Belleville*, 732.

See GAMING—NEGLIGENCE, 3
—STREET RAILWAYS—WAY.

MURDER.

See CRIMINAL LAW, 2.

NEGLIGENCE.

1. *Dangerous Premises—Invitation—Landlord and Tenant.*]—The defendants were the lessees of large grounds, which they used for the purpose of holding an annual exhibition of arts and manufactures, etc., and as an additional means of attracting the public various amusements were provided. Among these was a merry-go-round in a small fenced-in enclosure within the grounds, the owner of this merry-go-round having entered into a special agreement with the defendants as to the place and mode of using it, and for the payment to them of a

certain sum out of the moneys received by him for its use. For entrance to the grounds a fee was charged by the defendants, and for entrance to the small enclosure and use of the merry-go-round a further fee was charged by its owner. The plaintiff, having paid these fees, got on the merry-go-round, and was severely injured on its breaking because of a defect in its construction:—

Held, that the agreement in question was a license, not a lease; that the defendants had a right of supervision which they should have exercised; that they had impliedly invited the public to use the merry-go-round; and that they were liable in damages because of its negligent construction.

Judgment of Meredith, C.J., affirmed. *Flynn v. Toronto Industrial Exhibition Association*, 582.

2. *Erection of Building—Contract—Fall of Wall—Architect.*]—The defendants, being desirous of building a mill, obtained from the owner of a mill of the desired character in the same vicinity the plans used by him, which had been prepared by architects of high standing, and then proceeded to build in general accordance with these plans, employing an experienced builder. There was contradictory expert evidence as to the mode of construction and as to the doing of mason work in winter. After the walls and roof had been completed, machin-

ery was being brought into the building through large door openings left unclosed for that purpose. The wind during a violent storm, rushing in through the openings, forced off the roof, and the walls fell, the plaintiff's husband, who was working at the building, being killed:—

Held, that leaving the openings was not under the circumstances a negligent act, and that there was no liability in that respect.

Held, also, that there was no liability because of the mode of construction, even if defective, there being no patent defect or anything in the nature of a trap, an owner (in the absence of something of that kind) being entitled in carrying on building operations to rely on the plans of qualified architects and the skill of competent builders, and not being bound at his peril to acquire the technical knowledge necessary to enable him to decide as to the plans and nature of the work.

Judgment of Teetzel, J., affirmed. *Valiquette v. Fraser*, 57.

3. *Erection of Building — Appointment of Architect—Liability — Municipal Corporation.*—A building was being erected by a city under plans and specifications of an architect, the various works being let out to different contractors. While the plaintiff, a workman employed by the contractors for the carpentering work, was right-

fully working within the building, it collapsed by reason of insufficient truss rods placed therein through the architect's negligence; there being nothing, however, to shew any negligence or want of care on the part of the city in employing the architect:—

Held, that no liability was imposed on the city. *Hill v. Taylor et al.*, 643.

See MASTER AND SERVANT—RAILWAY—TRIAL, 3—WAY, 1.

NEW TRIAL.

See MUNICIPAL CORPORATIONS, 4—RAILWAY, 3—TRIAL, 3.

NEWSPAPER.

See CONTEMPT OF COURT—DEFAMATION.

NEXT FRIEND.

See COSTS, 4.

NONSUIT.

See RAILWAY, 3.

NOTICE.

See LIMITATION OF ACTIONS, 2—SPECIFIC PERFORMANCE.

NOTICE OF ACTION.

See INTOXICATING LIQUORS, 1.

OBSCENITY.

See CRIMINAL LAW, 5.

OUSTER.

See INFANT, 1.

OVERHOLDING TENANTS ACT.

See LANDLORD AND TENANT, 2.

PARLIAMENT.

1. *Election—Ballots Numbered by Deputy Returning Officer — Dominion Elections Act, 1900, sec. 80, sub-sec. 2.*]—The prohibition contained in sub-sec. 2 of sec. 80 of the Dominion Elections Act, 1900, 63 & 64 Vict. ch. 12 (D.), against the counting of ballot papers “upon which there is any writing or mark by which the voter could be identified” applies to ballot papers upon which a deputy returning officer has placed (not in the cases specially provided for in the Act) numbers corresponding respectively with the numbers opposite the names of the respective voters in the poll book, and such ballot papers must be rejected.

Where in consequence of this irregularity ballot papers sufficient in number to alter the result of the election had to be rejected, it was held, applying the principle of *Woodward v. Sarsons* (1875), L.R. 10, C.P. 733, that there must be a new election. *In re Wentworth Election (Dominion)*, *Sealey v. Smith*, 201.

2. *Election—Recount—Jurisdiction of Deputy Judge—Deputy Returning Officer's Non-compliance with Act—Ascertaining Result — Ballots — Marking.*]—A deputy county court Judge, in case of the illness of the county Judge, has jurisdiction to hold a recount of ballots in an election for the Provincial Legislature.

There is nothing in the Election Act making invalid or void the votes cast at any particular poll, in case the deputy returning officer has failed to comply with the requirements of the Act after the close of the poll; and where the deputy returning officer omits to return a statement of the votes cast, but the returning officer has no difficulty in ascertaining the number cast, the votes ought not to be rejected:—

Held, also, that a ballot was properly counted for a candidate which had a well formed cross in his division, although there was a distinct indication that a cross had been placed in the other division, which was afterwards erased.

Re West Elgin (No. 1) (1898), 2 Elec. Cas. 38, at p. 45, and *Re Lennox* (1902), 4 O.L.R. 378, followed.

Held, also, that a ballot with a mark 2 in one of the divisions was well marked.

Re West Huron (1898), 2 Elec. 58, cited. *Re Prince Edward Provincial Election*, 463.

3. *Election—Recount—Ballots—Mistaken Initials In-*

dorsed — Torn Ballot — Two Adhering as One—Marked with Numbers in Poll Book.—On a recount of ballots the county Judge having found that three ballots marked as delineated in the judgment, were good, and that the letters "B.S." on the back of a ballot were placed there by the deputy returning officer by mistake for his own initials "R.S.," and that the validity of that ballot was saved by sub-sec. 3 of sec. 112 of R.S.O. 1897, ch. 9, his decision was affirmed on appeal.

A ballot torn in two and pinned together, no part of it being absent or wanting, *held*, a good ballot.

Re West Huron (1898), 2 Elec. Cas. 58, at p. 62, distinguished.

Two ballots, consecutive in number, were supposed to have been handed to a voter sticking together as one, with the deputy returning officer's initials on the lower one, and the voter was supposed to have marked the upper one, not initialled, which was not discovered until the counting of the votes:—

Held, that the ballot marked but not initialled was properly rejected.

Held, also, that ballots marked on the back with the number in the poll book opposite to the name of each voter were properly counted.

Re Russell (2) (1879), H.E.C. 519, followed. *Re West Huron Provincial Election*, 602.

See CONTEMPT OF COURT—PENALTIES.

PART PAYMENT.

See LIMITATION OF ACTIONS, 1.

PARTIES.

Foreign Unincorporated Association—Local Branch—Right to Sue and Serve with Process—Representative Action for Tort—Rule 200—Selection of Representatives.—*Held*, affirming the decision of a Divisional Court, 5 O.L.R. 424, that the defendant associations, being trade unions not registered under the Trade Unions Act, one being a general association of the metal workers of the United States and Canada, and the other a local union or branch of the general association, were not corporations nor quasi-corporations nor partnerships, and were not capable of being sued and served with process as such in the ordinary way.

Held, also, varying the decision of MACMAHON, J., that both associations could be sued in respect of wrongs committed within the jurisdiction, in a representative action, under Rule 200.

Temperton v. Russell, [1893] 1 Q.B. 435, not followed, in view of the remarks in *Duke of Bedford v. Ellis*, [1901] A.C. 1, and *Taff Vale R. W. Co. v. Amalgamated Society of Railway Servants*, *ib.* 426.

Semble, that a wider selection of representatives of the general association should have been made, instead of confining it to the first vice-president: but

upon that point the defendants had concluded themselves by a consent. *Metallic Roofing Co. of Canada v. Local Union No. 30, Amalgamated Sheet Metal Workers' International Association et al.*, 171.

See DISCOVERY.

PARTITION.

See INFANT, 1.

PENALTIES.

Ontario Election Act—Bribery—Recovery of Penalty by Action.—The effect of the amendment of sec. 159 (2) of R.S.O. 1897, ch. 9, made by 63 Vict. ch. 4 (O.), by which persons committing various forms of bribery enumerated in the section (*a* to *e* inclusive) become on conviction liable to a fine of \$200 and imprisonment, is to take the penalties imposed by the amended clause out of the category of those which may be recovered by action under sec. 195.

Only one proceeding is contemplated by the amended section, and that is one in which both the penalty may be recovered and the imprisonment imposed. Both must follow on the conviction in one and the same proceeding taken to enforce them. Imprisonment cannot be adjudged in an action under sec. 195, which intends a proceeding by action to recover the money penalty only.

Judgment by Boyd, C., which followed that of Britton, J., in *Carey v. Smith* (1903), 5 O.L.R. 209, in dismissing the action, varied: and the action held maintainable under sec. 195 only for penalties imposed by secs. 162, 163, 165, 166, 168. *Asseltine v. Shibley*, 327.

See CRIMINAL LAW, 3—INTOXICATING LIQUORS, 2.

PLACE OF TRIAL.

See TRIAL, 1, 2.

PLAN.

See MUNICIPAL CORPORATIONS, 3.

PLEADING.

See DEFAMATION.

PLEDGE.

See BROKER.

PRACTICE.

1. *Discontinuing Action—Costs—Good Cause for Depriving Defendant of—Con. Rule 430 (4)—Corresponding English Rule.*—Plaintiff claiming that she was entitled to \$1,500—part of the moneys secured by two policies of \$500 and \$2,000 on her deceased husband's life—such amount being alleged to have been made over to her by her husband's dying declaration, her solicitor wrote

to a brother of the deceased, the supposed holder of the policies, notifying him of the plaintiff's claim, whereupon a solicitor replied that his instructions were that the two policies were "originally and always payable" to the deceased's mother, and so formed no part of the deceased's estate. The plaintiff's solicitor then wrote to the mother, to which the same solicitor replied that he could not understand the ground of the plaintiff's claim, but if she desired to commence an action he would accept service. The plaintiff thereupon commenced an action, which was defended by the said solicitor, but on the plaintiff subsequently discovering that the brother who had been first written to actually did hold the policies under an assignment from the mother, he wrote to the solicitor for his consent to discontinue the action without costs, and on this being refused, a motion therefor was made under Rule 430 (4):—

Held, that an order could properly be made for the discontinuance on the terms asked for.

Construction of Rule 430 (4) and difference in the corresponding English Rule pointed out.

Order of the Master in Chambers affirmed. *Armstrong v. Armstrong*, 14.

2. *Settlement of Action—Order Enforcing—O.J. Act—Jurisdiction.*]—Since the passing of the O.J. Act the compromise of an action will be enforced by an order of the

Court, and where the motion in such case is for judgment, and, analogous thereto, for judgment on the pleadings, the proper practice is by motion to a Judge in Court. *Pirung v. Dawson*, 248.

3. *Writ of Summons—Service out of Jurisdiction—Cause of Action, where Arising—Contract—Conditional Appearance.*]—On an application for the allowance of service of a writ of summons out of Ontario in an action on a contract, the plaintiff alleged and the defendant denied that the contract was to be performed within Ontario, within the meaning of Con. Rule 1246 :—

Held, that this issue was not to be determined in a summary way on affidavits, but the defendant's proper course was to enter a conditional appearance under Con. Rule 173, and then raise the question of the want of jurisdiction in his pleading. *Canadian Radiator Co. v. Cuthbertson*, 126.

4. *Writ of Summons—Service out of Jurisdiction—Contract to be Performed in Ontario—Con. Rule 162 (e).*]—The defendants, carrying on business in Montreal, gave an order in writing to the plaintiffs' traveller while he was there, which was to be and was accepted by the plaintiffs by letter from Toronto, the plaintiffs' place of business:—

Held, upon the facts, that an acceptance by post was within the contemplation of the parties, and that the contract was made

when the plaintiffs' letter accepting the order was mailed.

Plaintiffs' claim was for breach of contract and for goods sold and delivered. The contract provided that the goods were to be delivered f.o.b. at Toronto:—

Held, that the property in the goods passed on such delivery being made, and that a breach of the contract by non-acceptance was a breach within Ontario of an obligation of a contract to be performed within Ontario.

Held, also, that, even if the rule of law that a debtor must seek out his creditor to pay him, unless the application of it is inconsistent with the terms of the contract, is to be excluded, it was in the contemplation of the parties that payment was to be made at Toronto, and the obligation to pay was therefore one to be performed in Ontario.

Held, also, that an order for service out of the jurisdiction under Con. Rule 162 (e) was properly made.

Difference between the Rule in Ontario and the Rule in England considered.

Judgment of Britton, J., affirmed. *William Blackley, Limited, v. Élite Costume Co., Limited*, 382.

See ARBITRATION AND AWARD—COSTS—COURT OF APPEAL—DEFAMATION—DISCOVERY—DIVISION COURTS—EVIDENCE—JUDGMENT—PARTIES—REPLEVIN—SOLICITOR—TRIAL.

PRINCIPAL AND SURETY.

Guaranty — Application — False Answers—Basis of Contract — Insurance Act—R.S.O. 1897, ch. 203, sec. 144 (1) (2).—The plaintiff company's manager applied for and obtained from the defendants an agreement guaranteeing his fidelity, and accompanied his application with a declaration of its president, containing answers to questions touching his duties, which answers it was agreed were to be taken as the basis of the contract. The contract recited on its face as follows: "Whereas the employee has delivered to the company certain statements and a declaration setting forth among other things the duties and remuneration of the employee, and the checks to be kept upon his accounts, and has consented that such declaration and each and every the statements therein referred to or contained shall form the basis of the contract, but this stipulation is hereby limited to such of the statements as are material to this contract:—"

Held, that this had the effect of embodying the material facts of the preliminary application and declaration whether by the employee or employer into the face of the contract, and satisfied the requirements of sec. 144 (1) of the Insurance Act, R.S.O. 1897, ch. 203, that "the terms and conditions of the contract shall be set out in full on the face or back of . . . the contract."

Held, however, *per* BOYD, C., and MAGEE, J., MEREDITH, J., *contra*, that the case fell rather under sec. 144(2), which provides that any term or condition avoiding the contract on account of false preliminary statements, must be limited to cases in which such statements are material to the contract,—but does not require that such term or condition shall be contained in or indorsed upon the contract “in full.” It is enough if the contract “be made subject” to such stipulation.

Judgment of MACMAHON, J., 8 O.L.R. 117, reversed on this point.

Held, also, that the statements made by the plaintiffs’ president when seeking the insurance, that “all withdrawals from the savings bank require the joint cheque of the president and manager,” and that “a thorough and systematic audit is made by the company’s auditors,” whereas in fact the cheques were signed in blank by the president in batches, and so given to the manager, and no attempt was made to verify the savings bank accounts, were unquestionably material and affected the risk. *Elgin Loan and Savings Co. v. London Guarantee and Accident Co.*, 569.

PRIVILEGE.

See DEFAMATION.

PRIVY COUNCIL.

See COSTS, 5.

PROHIBITION.

See DIVISION COURTS, 3.

PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES — DIVISION COURTS, 2—LIMITATION OF ACTIONS, 1.

RAILWAY.

1. *Negligence—Dangerous Crossing—Failure to Give Warning—Contributory Negligence.*—A siding of the defendants’ line of railway, which was not used by the defendants more than two or three times a week, crossed a narrow arched-in lane or alleyway, held on the evidence to be a highway, very close to the face of the walls. The plaintiff’s servant had driven the plaintiff’s horse and waggon across the siding and through the alleyway to a warehouse close by, there being no engine or cars on the siding. The waggon was within a short time loaded with boxes, and the plaintiff’s servant then returned through the alleyway, the servant walking beside the waggon in order to steady the load. Just as the horse came out of the alleyway it was struck by a passing engine and severely injured. The whistle of the engine had not been sounded nor the bell rung. The plaintiff’s servant did not stop the horse at the mouth of the alleyway or look or listen for trains:—

Held, that assuming, but not deciding, that the duty to sound the whistle or ring the bell did not apply in the case of engines using a siding, it was nevertheless incumbent upon the defendants to give some warning before crossing the lane, especially in view of the very dangerous nature of the crossing, and that, not having done so, they were guilty of negligence and *prima facie* liable in damages.

Held, also, that, under the circumstances, it could not be said that there was not some evidence to support the finding of the Judge at the trial (the case having been tried without a jury) that the plaintiff's servant had not acted unreasonably, and was therefore not guilty of contributory negligence.

Judgment of the county court of Lincoln affirmed. *Smith v. Niagara and St. Catharines R. W. Co.*, 158.

2. *Accident — Negligence — Crowded Trains—Standing on Platform—Contributory Negligence.*] — The plaintiff when travelling by a train of the defendants was forced by overcrowding to resort to the platform outside one of the cars, and for better protection sat down on the second step, and while so sitting was thrust out by a swerve of the train, which made the people standing on the platform press up against him suddenly. This caused him to lose his balance, and one of his legs protruding, was struck by some

fixture on the track, and he sustained injuries:—

Held, that the defendants were liable.

Metropolitan R. W. Co. v. Jackson (1877), 3 App. Cas. 193, specially referred to. *Burris v. Père Marquette R. W. Co.*, 259.

3. *Negligence — Crossing Railway — Looking out — Whistling and Ringing Bell—Jury—Nonsuit—New Trial.*] — Plaintiff was driving a buggy on a road which crossed a railway. There was evidence that the night was very dark, the landmarks being undistinguishable; that he was watching to keep on the highway to avoid other vehicles, and was going faster than he thought he was, and not knowing he was near it, came on the railway crossing before he expected and was struck by a train, which had not given the statutory warning by blowing a whistle or ringing a bell, as it approached the crossing. There was also evidence that had he looked he might have seen the headlight of the advancing train, as the country was flat, and only one obstacle—ansrchar and some trees near the crossing:—

Held, that the case should not have been withdrawn from the jury, and a nonsuit was set aside and a new trial granted. *Cham-paigne v. Grand Trunk R. W. Co.*, 589.

4. *Second-class Passenger—Accommodation—Smoking Car.*] — A railway passenger holding a second-class ticket is

entitled to reasonable accommodation of the kind usually furnished to passengers of that class, and cannot be compelled to travel in a smoking car.

Judgment of BRITTON, J., affirmed, OSLER and GARROW, JJ. A., dissenting as to the conclusions of fact. *Jones v. Grand Trunk R. W. Co.*, 723.

See MASTER AND SERVANT, 3
—STREET RAILWAYS.

REAL PROPERTY LIMITATION ACT.

See LIMITATION OF ACTIONS.

REFERENCE.

See DISCOVERY, 1.

REFORMATION OF LEASE.

See INFANT, 1.

REGISTRY LAWS.

See LIMITATION OF ACTIONS, 2
—MUNICIPAL CORPORATIONS, 3
—SPECIFIC PERFORMANCE.

RELEASE.

See CONTRACT, 3.

RELIGIOUS COMMUNITY.

See SCHOOLS.

RELIGIOUS SOCIETY.

See CONTRACT 3.

REPLEVIN.

Application for Order to Sell —Con. Rules 1097, 1098.]—To obtain an order of replevin of some horses the plaintiff paid into Court \$2,000, and was paying over \$5 a day for their keep, and as no trial could be expected before the autumn, he applied under Con. Rules 1097 and 1098, for an order for sale:—

Held, that there was no power under the above Rules or otherwise to grant the order. *Innes v. Hutcheon*, 392.

REPRESENTATIVE ACTION.

See PARTIES.

RES JUDICATA.

See SHERIFF.

RESERVE FUND.

See COMPANY, 4.

RESTRAINT OF MARRIAGE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1.

RESTRAINT OF TRADE.

See CONTRACT, 2—CRIMINAL LAW, 7.

REVENUE.

Succession Duty — “Aggregate Value” of Property—*Incumbrances*.]—In establishing the “aggregate value” of the property of a deceased person under the Succession Duty Act,

R.S.O. 1897, ch. 24, as amended by 62 Vict. (2) ch. 9, and 1 Edw. VII. ch. 8, the value of the land of the deceased, where such land is incumbered or mortgaged, is to be regarded, and not merely the value of deceased's equity of redemption therein. *Attorney-General for Ontario v. Lee et al.*, 9.

RULES.

Con. Rule 162 (e).] — *See* PRACTICE, 4.

Con. Rule 173.] — *See* PRACTICE, 3.

Con. Rule 200.]—*See* PARTIES.

Con. Rule 268.]—*See* DEFAMATION.

Con. Rule 335.]—*See* SOLICITOR, 2.

Con. Rule 358.]—*See* SOLICITOR, 2.

Con. Rule 430 (4).] — *See* PRACTICE, 1.

Con. Rule 439 (2).] — *See* DISCOVERY, 2.

Con. Rule 440.]—*See* DISCOVERY, 1.

Con. Rule 466.]—*See* DISCOVERY, 1.

Con. Rule 491.]—*See* EVIDENCE, 1.

Con. Rule 529 (b).] — *See* TRIAL, 1, 2.

Con. Rule 616.]—*See* JUDGMENT.

Con. Rule 818.]—*See* COSTS, 5.

Con. Rule 1097.]—*See* REPLEVIN.

Con. Rule 1098.]—*See* REPLEVIN.

Con. Rule 1246.] — *See* PRACTICE, 3.

Con. Rule 1255 (818a).]—*See* COSTS, 5.

SALE OF GOODS.

1. *Property Passing—Consignor and Consignee—R.S.O. 1897, ch. 148, sec. 41—“Transfer,” Meaning of.*]—A quantity of furs were consigned by a manufacturer to a company at its risk as to burglary, fire, etc., with the right to the company to sell the same for such price and on such terms of credit or otherwise as it chose, and the company was to pay the manufacturer within twenty-four hours after the sale of any article according to a price list furnished with the goods, and it might become the owner of any article on payment of the price according to such list, with the right to the manufacturer and the company respectively to withdraw or return any of the goods, which right, from time to time, had been duly exercised. The company assigned for the benefit of creditors. The assignee claimed the furs not sold:—

Held, that the relationship between the parties was not that of vendor and purchaser, but of consignor and consignee

the property in the goods continuing in the consignor.

Held, also, that sec. 41 of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1897, ch. 148, did not apply, there not having been any sale of the goods, the word "transfer" also contained in the section being used in a limited sense, namely, in reference to a transaction in the nature of a sale.

Judgment of Meredith, C. J. C.P., 7 O.L.R. 356, affirmed. *Langley v. Kahnert*, 164.

2. *Agreement for—Statute of Frauds—Sale of Business as a Going Concern—Depletion of Stock.*]—Tenders having been advertised for by the plaintiffs, for the purchase, as a going concern, of a grocery and hardware business at so much on the dollar for the stock and fixtures, and for a sum to be specified for the goodwill, the advertisement stating that the stock sheets and conditions of sale were with plaintiffs' solicitor, where they might be seen, the defendant, on seeing the advertisement, inspected the stock lists, and, according to the solicitor's statement, which the plaintiff denied, authorized him to write out and sign the defendant's name to a tender offering 75c. and 50c. respectively for the grocery and hardware stocks, but making no offer for the goodwill. This offer was accepted by the plaintiffs, and notice thereof in writing given by the solicitor to the defendant, containing a request

to call and execute the agreement in accordance with conditions of sale, and to make his deposit. This the defendant refused, by letter, to do, repudiating any liability on the contract. The conditions of sale were never produced or proved, while a large quantity of staple goods had been sold prior to time for completion of the contract:—

Held, that no valid contract under the Statute of Frauds was established; and further, that by the depletion of the stock, the plaintiffs were not in a position to carry out the alleged contract.

Judgment of MACMAHON, J., at the trial reversed. *Trusts and Guarantee Co. v. Ross*, 715.

See REPLEVIN.

SALE OF LAND.

See SETTLED ESTATES ACT — SPECIFIC PERFORMANCE — TRUSTS AND TRUSTEES—VENDOR AND PURCHASER.

SCALE OF COSTS.

See COSTS, 2.

SCHOOLS.

Separate Schools—Religious Community—Teachers—"Persons"—Statutes.]—The general policy declared by later statutory enactments is to require teachers of separate schools to undergo the same examinations and receive the

same certificates as common school teachers, exempting from its immediate operation those persons who hold certificates granted by trustees under C.S.U.C. ch. 65, sec. 28.

The word "persons" in sec. 36 of ch. 294, R.S.O. 1897, is to be read as "individuals," and where, as in that enactment, there is found in unambiguous language a general declaration as to the qualification required, any restriction upon that declaration should not be extended beyond what the language, construed in the ordinary and natural meaning of the words and in the light of the context, clearly requires.

Judgment of MACMAHON, J., 8 O.L.R. 135, affirmed. *Grattan v. Ottawa School Trustees*, 433.

See MUNICIPAL CORPORATIONS, 2.

SECURITY FOR COSTS.

See COSTS, 4—SOLICITOR, 2.

SERVICE OF PAPERS.

See SOLICITOR, 2.

SERVICE OUT OF THE JURISDICTION.

See PARTIES—PRACTICE, 3, 4.

SETTLED ESTATES ACT.

Trust for Sale—Limitation "by Way of Succession"—R.S.O. 1897, ch. 71, secs. 2 (1), 33.]—Under the scheme of a

will, land was to be rented by the executors until the testator's youngest son came of age, unless, with the sanction of certain adult children, the executors should sooner sell the property at good advantage:—

Held, that this was substantially a trust for sale of the land, but not till the youngest child was of age, unless sooner sold as directed, and was a limitation "by way of succession" within the Settled Estates Act, R.S.O. 1897, ch. 71, sec. 2 (1); and a sale was directed under that Act. *In re Cornell*, 128.

See INFANT, 1.

SETTLEMENT.

See DEVOLUTION OF ESTATES ACT.

SETTLEMENT OF ACTION.

See PRACTICE, 2.

SHARES.

See BROKER—COMPANY.

SHERIFF.

Bond—Condition on Appointment to Office—Resignation of Office—Re-appointment—Subsequent Breaches—Liability for—Crown—Res Judicata.]—Plaintiff resigned his office of sheriff, and defendant was appointed in his place, under a commission containing a condition that he should pay plaintiff "out of the revenues of the

said office " a certain sum for his life ; and he gave a bond to the plaintiff for the due fulfilment of the condition. Finding that the revenues were not sufficient to pay the amount, the defendant resigned his office, and soon afterwards was re-appointed, under a commission without any such condition.

In an action on the bond, the plaintiff obtained judgment for the amount of the penal sum, and damages were assessed for the breaches up to the time of the defendant's resignation.

A petition was subsequently presented by the plaintiff, asking for assessment of damages for alleged breaches since the re-appointment and for execution. On the trial of an issue as to whether the plaintiff was entitled to execution for any further damages :—

Held, that want of good faith was not to be imputed to the Crown, who had the right to permit, and did permit, defendant's resignation, and by accepting it made it effectual, and thereby discharged the condition and all further liability on the bond ; that the condition was attached to the first commission, and the annuity was payable only during the occupancy of the office thereunder, and when that commission was gone there ceased to be any contract to pay it.

Semble, that there was no implied obligation on the defendant's part to refrain from invoking the consideration of the Crown to relieve him from the

obligation it had imposed upon him.

Held, also, that the question was not *res judicata* by the principal judgment, and that the judgment upon the issue was appealable as a final judgment as to matters set up as a defence to further liability in respect of alleged breaches subsequent to the new appointment.

Judgment of Falconbridge, C.J.K.B., reversed. *Smart v. Dana*, 427.

SHORT FORMS ACT.

See LANDLORD AND TENANT, 1.

SOLICITOR.

1. *Maintenance — Conducting Case Gratuitously.* — A solicitor brought an action on his bill of costs in connection with certain litigation carried on by him on the defendant's behalf, and on motion for summary judgment the defendant alleged that the solicitor took up the case on the condition that he was to get the costs out of the defendants thereto, and that if the litigation failed all the defendant would have to pay was the costs of the other side :—

Held, that the agreement alleged was not champertous, nor did it come within the prohibition against maintenance.

A solicitor may conduct a case out of charity from friendship towards his client. *In re Solicitor, Clark v. Lee*, 708.

2. *Solicitors on the Record—Service on—Con. Rules 335, 358—Authority—Continuation of.*]—By reason of a change in the plaintiff's firm of solicitors an order for security for costs was not complied with, and an order was made dismissing the action, on which, however, no judgment was entered. On the dismissal coming to the solicitors' knowledge, they gave notice of motion under Rule 358 to be allowed to put in security and proceed with the action, which was served on the defendant's solicitor on the record, who since the dismissal of the action had had no communication with the defendant, he having left the Province without giving his address:—

Held, that the action was still pending, and that the service was good. *Muir v. Guinane*, 324.

See MASTER AND SERVANT, 5
— SPECIFIC PERFORMANCE —
TRIAL, 1.

SPECIAL CASE.

See ARBITRATION AND AWARD.

SPECIFIC PERFORMANCE.

Statute of Frauds—Memorandum in Writing—Receipt—Omitted Terms—Registry Act—Notice—Solicitor.]—The owner of a house orally agreed to sell it for \$400, payable \$50 in cash and \$350 by the assumption of a mortgage, the purchaser to pay the taxes for the

current year and interest on the mortgage from a date some months prior to the making of the agreement. The purchaser paid \$10 at the time, and received from the vendor the following receipt: "Received from Mr. E. G. the sum of \$10 on house and lot number (describing it) sold by Mr. J. S. for \$350 by paying \$50 to Mr. S., allowing one-half for lawyers' fees, also paying water rates. Balance \$40 on house:—"

Held, that it might properly be inferred from this receipt that E. G. was the purchaser and that the price was \$400, and that, had the matter rested there, the receipt would have been a sufficient memorandum; but that the omission of the admitted terms as to taxes and interest was fatal to its sufficiency.

Martin v. Pycroft (1852), 2 D. M. & G. 785, considered.

Judgment of Teetzel, J., reversed.

Notice to a solicitor acting for a would-be purchaser, of a prior agreement for sale, is notice to the client, who cannot upon an agreement for sale being entered into with him claim the benefit of the Registry Act. *Green v. Stevenson*, 671.

See STREET RAILWAYS, 1—
TRUSTS AND TRUSTEES.

STATUTE OF FRAUDS.

See CONTRACT, 1, 3—SALE OF
GOODS, 2—SPECIFIC PERFORMANCE.

STATUTES.

- C.S.U.C. ch. 65, sec. 28.....
See SCHOOLS.
- R.S.C. 1886, ch. 35, sec. 2.....
See CRIMINAL LAW, 1.
- R.S.C. 1886, ch. 129.....
See COMPANY, 3.
- R.S.O. 1887, ch. 106.....
See LANDLORD AND TENANT, 1.
- 52 Vict. ch. 20, sec. 2 (D.).....
See CRIMINAL LAW, 1.
- 52 Vict. ch. 41 (D.).....
See CRIMINAL LAW, 7.
- 53 Vict. ch. 33, secs. 3, 72 (D.).....
See CONTRACT, 2.
- 53 Vict. ch. 99 (O.).....
See STREET RAILWAYS, 1.
- 55 & 56 Vict. ch. 29, sec. 179 (a) (D.).....
See CRIMINAL LAW, 5.
- 55 & 56 Vict. ch. 29, sec. 449 (b) (D.)..
See CRIMINAL LAW, 4.
- 55 & 56 Vict. ch. 29, sec. 520 (d) (D.)..
See CONTRACT, 2.
- 55 & 56 Vict. ch. 29, sec. 520 (d) (D.)..
See CRIMINAL LAW, 7.
- 55 & 56 Vict. ch. 29, sec. 592 (D.)....
See CRIMINAL LAW, 2.
- 55 & 56 Vict. ch. 29, sec. 661 (2) (D.)..
See CRIMINAL LAW, 2.
- 55 & 56 Vict. ch. 29, sec. 930 (D.)....
See CRIMINAL LAW, 7.
- 59 Vict. ch. 105 (O.).....
See STREET RAILWAYS, 2.
- R.S.O. 1897, ch. 1, sec. 8 (24).....
See DIVISION COURTS, 2.
- R.S.O. 1897, ch. 9, sec. 112, sub-sec. 3.
See PARLIAMENT, 3.
- R.S.O. 1897, ch. 9, secs. 159 (2), 162, 163, 165, 166, 168.....
See PENALTIES.
- R.S.O. 1897, ch. 24.....
See REVENUE.
- R.S.O. 1897, ch. 48, sec. 7.....
See COSTS, 5.
- R.S.O. 1897, ch. 60, sec. 72.....
See DIVISION COURTS, 2.
- R.S.O. 1897, ch. 60, secs. 190, 193....
See DIVISION COURTS, 1.
- R.S.O. 1897, ch. 61, sec. 94.....
See CRIMINAL LAW, 6.
- R.S.O. 1897, ch. 62, secs. 12 (2), 41..
See ARBITRATION AND AWARD.
- R.S.O. 1897, ch. 62, sec. 29.....
See DISCOVERY, 1.
- R.S.O. 1887, ch. 71, sec. 2 (1).....
See SETTLED ESTATES ACT.
- R.S.O. 1897, ch. 72.....
See LIMITATION OF ACTIONS, 1.
- R.S.O. 1897, ch. 108.....
See INTOXICATING LIQUORS, 2.
- R.S.O. 1897, ch. 127.....
See DEVOLUTION OF ESTATES ACT.
- R.S.O. 1897, ch. 133.....
See LIMITATION OF ACTIONS, 2, 3.
- R.S.O. 1897, ch. 136.....
See LIMITATION OF ACTIONS, 2—SPECIFIC PERFORMANCE.
- R.S.O. 1897, ch. 148, sec. 41.....
See SALE OF GOODS, 1.
- R.S.O. 1897, ch. 160, secs. 3 (1), 6 (1).
See MASTER AND SERVANT, 1.
- R.S.O. 1897, ch. 171.....
See LANDLORD AND TENANT, 2.
- R.S.O. 1897, ch. 191.....
See COMPANY, 1.
- R.S.O. 1897, ch. 203, sec. 144 (1), (2)..
See PRINCIPAL AND SURETY.
- R.S.O. 1897, ch. 203, sec. 148 (1).....
See INSURANCE, 9.
- R.S.O. 1897, ch. 203, sec. 159 (1).....
See INSURANCE, 7.
- R.S.O. 1897, ch. 203, sec. 166.....
See INSURANCE, 4.
- R.S.O. 1897, ch. 203, sec. 168 (3), (23).
See INSURANCE, 6.
- R.S.O. 1897, ch. 203, sec. 169.....
See INSURANCE, 5.
- R.S.O. 1897, ch. 205, secs. 2 (5), 117..
See CRIMINAL LAW, 3.
- R.S.O. 1897, ch. 223, sec. 549 (4).....
See GAMING.
- R.S.O. 1897, ch. 245, secs. 16, 49 (1), 51, 64 (1), (2), 126.....
See INTOXICATING LIQUORS, 2.

- R.S.O. 1897, ch. 256, sec. 20 (c), (d).
See MASTER AND SERVANT, 2.
- R.S.O. 1897, ch. 294, sec. 36.....
See SCHOOLS.
- 62 Vict. (2) ch. 9 (O.).....
See REVENUE.
- 62 Vict. (2) ch. 31, secs. 4, 30 (O.) ...
See INTOXICATING LIQUORS, 2.
- 63 Vict. ch. 4 (O.)
See PENALTIES.
- 63 Vict. ch. 27, sec. 12 (O.).....
See CRIMINAL LAW, 3.
- 63 Vict. ch. 102, secs. 1, 5 (O.)
See STREET RAILWAYS, 1.
- 63 & 64 Vict. ch. 12, sec. 80, sub-sec.
 2 (D.)
See PARLIAMENT, 1.
- 1 Edw. VII. ch. 8 (O.)
See REVENUE.
- 1 Edw. VII. ch. 19, sec. 1 (D.).....
See CRIMINAL LAW, 1.
- 3 Edw. VII. ch. 19, secs. 591 (12),
 632 (O.)
See MUNICIPAL CORPORATIONS, 3.
- 3 Edw. VII. ch. 19, sec. 617, sub-sec.
 2 (O.)
See WAY, 2.
- 4 Edw. VII. ch. 11, sec. 76 (1) (g) (O.)
See COURT OF APPEAL.
- 4 Edw. VII. ch. 12, sec. 1 (O.).....
See DIVISION COURTS, 2.
- 4 Edw. VII. ch. 17, sec. 4 (O.).....
See CRIMINAL LAW, 3.
- 4 Edw. VII. ch. 22, sec. 26 (O.).....
See MUNICIPAL CORPORATIONS, 3.

STATUTES, INTERPRETATION OF.

See SCHOOLS.

STOCK TRANSACTIONS.

See BROKER.

STREET RAILWAYS.

*Toronto Railway Company—
 Extension of Railway—Time*

*Tables — Open Cars—Heating
 —Night Cars—Rights of City
 as to—Specific Performance—
 63 Vict. ch. 102, secs. 1 and 5
 (O.)]* — Under the agreement
 between the plaintiffs and de-
 fendants, which is set out in
 53 Vict. ch. 99 (O.), the right to
 determine what new lines should
 be established and laid down is
 vested in the city, and applies
 as well to the streets within
 the city as it existed at the
 time of the making of the agree-
 ment, as to the streets in the
 territory from time to time
 brought within it; and for the
 company's failure to establish
 and lay down such new lines,
 the city is not limited merely
 to the right provided for in the
 agreement of granting such
 privilege to others.

The right, under such agree-
 ment, to settle the time tables
 and to fix the routes of the cars,
 to determine when open cars
 should be taken off in the au-
 tumn or resumed in the spring,
 and as to when and how cars
 should be heated, is for the city
 engineer, subject to the approv-
 al of the city council. The
 city have no power to compel
 the company to continue to run
 after midnight any car which,
 having started before midnight,
 cannot in due course finish its
 route by that time.

On a special case stated in an
 action, only such questions will
 be answered as must necessarily
 arise in the action.

The Court, therefore, in view
 of 63 Vict. ch. 102, secs. 1 and
 5 (O.), being made applicable

to the city, declined to answer a question raised in a special case as to the right of the city to have specifically performed those provisions of the agreement herein found in its favour; and an expression of opinion previously given against granting such specific performance, following *City of Kingston v. Kingston, etc., Electric R.W. Co.* (1898), 25 A.R. 462, was withdrawn. *City of Toronto v. Toronto R.W. Co.*, 333.

2. *By-laws — Mayor's Signature—Resolution—By-Laws as to Routes and Speed—Ratio of Track Mileage to Increased Population — Newly Acquired Territory — 59 Vict. ch. 105 (O.)*—The defendants passed a resolution authorizing certain extensions and changing some of the routes of the plaintiffs' railway, and the plaintiffs, relying upon a by-law being passed later to carry out the resolution, performed certain work and incurred expense. The by-law was subsequently passed, read a first, second, and third time at one meeting of the defendants' council, signed by the clerk, sealed with the municipal seal, but not signed by the mayor.

In an action to compel the mayor to sign it and the defendants to accept an agreement to carry it out:—

Held, that the company took the risk of a by-law being passed, and that they were not misled; and that without the mayor's signature it was incomplete and invalid.

Held, also, that two by-laws, set out in the judgment of MacMahon, J., as to the routes and speed of the plaintiffs' cars, were, under the circumstances, valid as being within the defendants' power and authority under 59 Vict. ch. 105 (O.), which validated a by-law of the defendants and an agreement between plaintiffs and defendants under which the plaintiffs built and operated their railway.

By the original by-law, under which the road was authorized to be built and operated, as set out in the judgment of MacMahon, J., the defendants were bound to establish new lines, as might be directed by by-law of defendants, in the proportion of one mile of track to every 2,000 inhabitants of the city then existing or thereafter extended, the population to be ascertained as mentioned in the by-law, and that in the event of any local municipality being annexed, the railways of the company within the annexed municipality, and the company in relation thereto, should have all the rights and be subject to the terms of the by-law. A local municipality was annexed to the defendants' municipality in 1898, and at the time of the annexation had a street railway trackage of 5,900 feet. The population of the city in 1901 was 39,183, being an increase of 4,183, and the proportion of additional trackage to population was 11,043 feet. By a subsequent by-law defendants were directed to con-

struct 7,380 feet of additional track:—

Held, Maclellan, J. A., dissenting, that under the original by-law the mileage of the local municipality must be added to the mileage of the lines in the city at the time of the annexation, and the amount deducted from the amount required by the last mentioned by-law, which was consequently bad as being in excess of the mileage the defendants could require. *London Street R.W. Co. v. City of London*, 439.

SUCCESSION DUTY.

See REVENUE.

SUMMARY CONVICTION.

See CRIMINAL LAW—GAMING.

SUMMARY JUDGMENT.

See JUDGMENT.

TAXATION OF COSTS.

See COSTS, 3.

TAXING OFFICER.

See COSTS, 3.

TENANTS IN COMMON.

See INFANT, 1.

TENDER.

See MUNICIPAL CORPORATIONS, 4.

THEFT.

See CRIMINAL LAW, 1.

TIMBER.

See INSURANCE, 4—WASTE.

TORONTO RAILWAY COMPANY

See STREET RAILWAYS, 1.

TRADE ASSOCIATION.

See CONTRACT, 2—CRIMINAL LAW, 7.

TRADE MARK.

See CRIMINAL LAW, 4.

TRANSFER OF SHARES.

See COMPANY, 1.

TRESPASS.

See INTOXICATING LIQUORS, 1.

TRIAL.

1. *Venue—Where Cause of Action Arose and Parties Resided—Change—Affidavits—Solicitor.*—Con. Rule 529 (b) applies to county court cases, and under that Rule the venue was changed and the action transferred to the court of the county where the cause of action arose and the parties resided.

Corneil v. Irwin (1903), 2 O.W.R. 466, followed.

The affidavits upon such a motion should be made by the party himself and not by his solicitor.

In any event an affidavit by the solicitor merely stating that the action could be more conveniently tried in a named county was too vague.

Hood v. Cronkrite (1868), 4 P.R. 279, referred to. *Leach v. Bruce*, 380.

2. *Venue*—*All Parties in Same County*—*Con. Rule 529 (b).*—On an equitable construction of *Con. Rule 529 (b)*, where the cause of action has arisen in the county in which all the parties to it who are within the jurisdiction reside, the venue should be in the county town of that county, although there may be other parties who live outside the jurisdiction.

Proper principles in respect to change of venue considered.

Decision of Meredith, J., reversed. *Saskatchewan Land and Homestead Co. v. Leadley*, 556.

3. *Questions to Jury*—*Answers of Jury*—*Accident to Workman*—*Negligence.*—New trial ordered in an action by a workman against his employer, for personal injuries sustained through carelessness of a fellow workman, because, although the jury found negligence imputable to the defendants and had stated in what that negligence consisted, they were not asked to and did not find whether such negligence was the cause of the plaintiff's injuries; nor when asked whether the defendant through its foreman was guilty of negligence, and if so in what such negligence consisted, were they explicitly directed to con-

fine their findings to such negligence, if any, as, upon the evidence, they should be satisfied had caused the explosion which injured plaintiff. *Hillyer v. Wilkinson Plough Co.*, 711.

TRUSTS AND TRUSTEES.

Sale of Land—*Majority of Trustees*—*Specific Performance.*—Land was vested in three trustees in trust to sell at any time in their discretion. All three were willing to accept an offer which had been made, but while this offer was open, and within a week, two of the trustees, in the name of all, accepted another offer for a considerably larger sum from another person, without, as was held on the evidence, giving the third an opportunity of considering this offer, and without authority from him to accept it:—

Held, that the two trustees could not bind the third, and that the second proposed purchaser could not obtain specific performance.

Judgment of a Divisional Court reversed. *Gibb v. McMahon*, 522.

See INTOXICATING LIQUORS, 2
—MUNICIPAL CORPORATIONS, 4
—SETTLED ESTATES ACT.

UNDUE INFLUENCE.

See COSTS, 1.

VENDOR AND PURCHASER.

Covenant—*Building Restriction*—*House*—*Stable.*—The owner of two adjoining parcels

of land sold and conveyed one, the deed containing a covenant by the purchaser for himself, his heirs, executors, administrators, and assigns, not to "erect or build more than one house upon the property hereby conveyed;" with special provisions as to the cost and materials of "any house so erected," and as to the distance of its walls from the boundaries of the parcel conveyed. The vendor subsequently conveyed his parcel to the testator of the plaintiffs, having first erected a stable upon it. The parcel first sold by him became vested by various mense conveyances in the defendants, who built a stable upon part of it, sufficient space being left within the prescribed boundaries for the erection of a house of the nature and value provided for in the covenant, and such a house the defendants asserted they intended to build :—

Held, that the burden and benefit of the covenant passed with the respective parcels; that the covenant operated only as a restriction against the building of more than one house upon the property in question; that it was not wide enough to present the building of a stable as appurtenant to a house; that, this being so, there was no reason why the stable should not be built first and the house afterwards; and that, apart from the construction of the covenant, the original vendor having himself built a stable on his property, the right to

complain of the building of a stable on the adjoining property was gone. *Hime v. Lovegrove*, 607.

See SPECIFIC PERFORMANCE
—TRUSTS AND TRUSTEES.

VENUE.

See TRIAL, 1, 2.

WASTE.

Repairs—Selling Timber—Law of England—Application thereof to Ontario.]—Where a building needed repair, and the timber on the place was unsuitable, and the tenant for life proposed to sell sufficient timber off the place to pay for the kind of timber required, and for that purpose only :—

Held, that this would not be waste, if the timber was cut with due regard to the situation of the bush and the cleared land, and no unreasonable amount was taken off to recoup the cost of the timber used in the repairs.

All the niceties of the ancient learning as to waste are not to be transferred without discrimination to such a country as this Province. *Hixon v. Reaveley*, 6.

See INFANT, 1.

WATER AND WATERCOURSES.

Grant of Water Power—Construction—Specific Use—"Their Own Purposes"—"Surplus Water."]—The plaintiffs and

defendants were respectively the owners of grist mills, and were each seised in fee of an undivided half of a dam on a river, and both had the right, by an agreement between their predecessors in title made in 1880, to draw water therefrom "for their own purposes." The agreement provided for the maintenance and repair of the dam at the joint and equal expense of the parties, and that both should be equally interested in rents derived from supplying water to others. For many years the parties and their predecessors had used the waters stored by the dam as they required them. The owner of a saw mill above the defendants' grist mill had, under a lease from the common grantor of the plaintiffs and defendants, the right to use "surplus waters" stored by the dam and not required by the grist mills. This right was continued by the separate owners of the grist mills; and the plaintiffs and defendants, under the agreement, shared equally in the rents. Shortly before this action was begun, the defendants became the owners of the saw mill:—

Held, that a construction of a grant of a water power which will restrict the grantee to the specific use to which the water was applied when the grant was made, will not be adopted, unless the language of the grant unmistakably indicates such to have been the intention of the parties.

Held, upon the documents and evidence, that each party

had an absolute right to use, in a reasonable manner, for their own purposes, so much of the dammed water which might properly be used for generating power as they required, not exceeding one-half of the whole, and so much of the remaining water, which might be properly so used, as would not interfere with or impair the user in a reasonable manner by the other party of the water to which he was entitled, and which he from time to time required.

"Their own purposes" meant any lawful uses to which the water might reasonably be put in a business owned and conducted by the party, as distinguished from a grant or lease to a third party of the right to use such water; and any water not required by either party "for their own purpose," thus defined, was "surplus water." *Caledonia Milling Co. v. Shirra Milling Co.*, 213.

WAY.

1. *Highway — Negligence — Repairs — Want of Warning — Proximate Cause of Accident — Horse beyond Control — Municipal Corporations.*] — Where two causes combine to produce an injury, both of which are in their nature proximate, the one being a defect in a highway and the other some occurrence for which neither party is responsible, a municipal corporation is liable in damages if the injury would not have been

sustained but for the defect in the highway.

The defendants were held liable in damages because while they were repairing a bridge on a highway they failed to give warning or put up a barrier, and an accident happened in consequence of a driver's attempt to turn suddenly off the highway when he came to the bridge, his horse at the time being almost beyond his control in consequence of a break in the harness.

Judgment of Idington, J., reversed. *Thomas v. Township of North Norwich*, 666.

2. *Highways and Bridges—Deviation—Consolidated Municipal Act, 3 Edw. VII. ch. 19, sec. 617, sub-sec. 2—Municipal Corporation.*] — *Held*, Osler, J. A., dissenting, that the road in question was a boundary line road within the meaning of 3 Edw. VII. ch. 19, sec. 617, sub-sec. 2, notwithstanding its deviation for the purpose of avoiding the expense of building bridges across a river.

The history and meaning of the boundary line road legislation discussed.

Judgment of Falconbridge, C.J.K.B., reversed in part. *Township of Fitzroy v. County of Carleton*, 686.

WILL.

1. *Brewery Business — No Express Authority to Carry on — Authority to do so Refused.*]

—Where under a will no express power has been given to carry on the deceased's business, an order will not be made authorizing the carrying on of the same by the personal representatives. Discretionary power was, however, given in this case, that of a brewery business, either to sell the chattel property and lease the brewery, or to sell the business as a going concern with a lease of the premises until the date fixed for distribution, with an agreement for sale if deemed advisable, subject to the approval of the beneficiaries, on an infant beneficiary attaining her majority. *Re Brain, Brain v. Brain*, 1.

2. *Gift for Life—Right to Corpus — Codicil.*] — Under a will, among other matters, the executors were to hold the estate in trust to pay testator's wife \$600 annually, which was to be duly secured to her; his son to be paid for five years after his death the income derived from the rest of his estate, and on the expiration of such period the principal thereof, reserving however a sufficient sum to secure the payment of the \$600, and on his wife's death they were directed to pay to his said son all the rest and residue of his property. By a codicil, in addition to securing the payment of the \$600, his executors were directed to retain and invest a sum of \$10,000 and to pay to his said son the income thereof during his lifetime, and after his death to pay the prin-

cipal to such persons as the son should by will direct :—

Held, that under the codicil alone the son would only take a life interest in the \$10,000, but when read in connection with the will he took the amount absolutely. *Re Hanmer*, 348.

3. *Construction—Vesting—Life Estate—Remainder—“Family.”*]—A testator provided that his son A. and his daughter M. should have, after the death of his wife if she should survive him, the life use of all his real and personal property to hold to them jointly during their natural lives if they should survive him, and to the longest liver of them; and that after the death of his wife, and his son A., and his daughter M., all real property belonging to him should be divided into three equal portions and distributed as follows, one portion to his son J.'s family, one portion to his son G.'s family, and one portion to his daughter M.'s family :—

Held, that the word “family” meant and included only the children of the two sons and the daughter, and that these children took among themselves per capita, and that the estates of the children became on the death of the testator vested estates in remainder subject to the respective life estates of the wife, the son A., and the daughter M. *Harkness v. Harkness*, 705.

See COSTS, 1—DEVOLUTION OF ESTATES ACT—INFANT, 2.—INSURANCE, 7.

WINDING-UP.

See COMPANY, 2, 3, 4.

WITNESSES.

See EVIDENCE.

WORDS.

“Aggregate Value.”] — See REVENUE.

“By Way of Succession.”] — See SETTLED ESTATES ACT.

“Carrying on Business.”] — See DIVISION COURTS, 1.

“Family.”] — See WILL, 3.

“Intervener.”] — See DIVISION COURTS, 1.

“Just and Reasonable.”] — See INSURANCE, 5.

“Knowingly.”] — See CRIMINAL LAW, 5.

“Legal Heirs.”] — See INSURANCE, 7.

“Obscene.”] — See CRIMINAL LAW, 5.

“Persons.”] — See SCHOOLS.

“Property.”] — See INSURANCE, 4.

“Right Heirs.”] — See DEVOLUTION OF ESTATES ACT.

“Surplus Water.”] — See WATER AND WATERCOURSES.

“Their Own Purposes.”] — See WATER AND WATERCOURSES.

“Transfer.”] — See SALE OF GOODS, 1.

WORKMEN'S COMPENSATION FOR INJURIES ACT.

See MASTER AND SERVANT, 1.

WRIT OF SUMMONS.

See PARTIES—PRACTICE, 3, 4.

